IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment	2
Motion by Defendant for an Order Dismissing the Indictment	3
Excerpts from Transcript of Proceedings	4
Guy Porter Gillette (Direct Examination)	7
Cross Examination	15
Judgment of the Court	18

Page

Letter dated April 29, 1967 23

Selective Service System Special Form for Conscientious Objector 25

Letter dated December 27, 1967 to Local Board No. 8 32

Letter dated May 17, 1967 to Local Board No. 8 33

Letter dated May 17, 1967 to The Chairman Local Draft Board Yonkers, N.Y. 35

Letter dated May 22, 1967 to Local Board No. 8 37

Letter dated May 25, 1967 from Guy Gillette 39

Letter dated June 1, 1967 to Chairman, Local Board No. 8 . . . 40

Letter dated June 1, 1967 to Miss Mary Golder, Assistant Clerk, Local Board No. 8 41

Summary of Appearance Before Local Board 43

RELEVANT DOCKET ENTRIES

February 3, 1969 - Filed indictment.

February 14, 1969 - Pleads Not Guilty Deft ordered fingerprinted Released on own recognizance. Motions Ret: 3/11/69. Tenney, J.

March 6, 1969 - Filed affdvt. & notice of motion to dismiss indictment ret. 3-11-69

March 12, 1969 - Filed Motion to Dismiss Argued. Decision-Reserved. Wyatt, J.

April 15, 1969 - Filed in court on 3-11-69 Affdvt. of Daniel J. Sullivan, Asst. U.S. Atty re: motion to dismiss & memorandum of law on motion to dismiss.

April 15, 1969 - Docketed memo endorsed on motion filed 3-6-69 *** the motion is denied–so ordered–signed on 4-14-69 (mailed notice) Wyatt, J.

August 25, 1969 - before Wyatt, J.–Jury trial begun & concluded. Deft. sentenced (atty present) Guilty–Deft. committed to custody of Atty General for a period of two (2) years. Deft. to surrender to U.S. Marshal by 9-22-69 by 10:30 A.M. room 318, and is continued on own recognizance until that time. Deft. advised of his rights to appeal. Wyatt.

August 25, 1969 - Filed Judgment (atty present) It is adjudged that the deft. is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for a period of Two (2) Years. The deft is continued on his own recognizance until September 22, 1969 at 10:30 a.m., at which time he is to surrender to the U.S. Marshal for service of sentence. Wyatt, J.

August 25, 1969 - Issued commitment & copies.

August 29, 1969 - Filed notice of appeal to the U.S.C.A. second circuit. $5.00 paid (sent notice)

September 23, 1969 - Filed Transcript of record of proceedings, dated 8-25-69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. D. OF N. Y.

UNITED STATES OF AMERICA :

-v- : INDICTMENT

GUY PORTER GILLETTE, : 69 Cr. 97

Defendant. :

69 Cr. 97

U.S. DISTRICT COURT
FEB 3 1969
S. D. OF N. Y.

The Grand Jury charges:

On or about the 14th day of December, 1967, and up to and including the date of the filing of this indictment, in the Southern District of New York, GUY PORTER GILLETTE, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 et seq., and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to report at the office of Local Board No. 8, 45 So. Broadway, Room 111, Yonkers, New York, for induction into the Armed Forces of the United States.

FILED
FEB 3 1969
A. DANIEL FUSARO, CLERK

(Title 50 Appendix, United States Code, Section 462(a) 32 C.F.R. 1632.14)

Foreman

ROBERT M. MORGENTHAU
United States Attorney

UNITED STATES OF AMERICA

v

GUY PORTER GILLETTE, Defendant

69 Cr. 97

This is a motion by defendant for an order dismissing the indictment. Citation is to Fed. R. Crim. P. 12.

The indictment charges in one count failure of defendant as a registrant to report for induction into the Armed Forces of the United States (50 U.S.C. App. § 462(a); 32 CFR § 1632.14).

The motion raises issues of fact. There is no motion for summary judgment in a criminal case. If it be suggested that the "defense" raised by the motion is one "which is capable of determination without the trial of the general issue" (Fed. R. Crim. P. 12(b) (1)), then it clearly ought to be "deferred for determination at the trial of the general issue" (Fed. R. Crim. P. 12(b) (4)). *United States v. Fargas*, 267 F. Supp. 452, 455-57 (S.D.N.Y. 1967); see also *United States v. Gearey*, 368 F.2d 144, 150-51 (2d Cir. 1966); cf. *United States v. Stafford*, 389 F.2d 215, 219 (2d Cir. 1968); *United States v. Jakobson*, 325 F.2d 409, 417 (2d Cir. 1963) (dictum), aff'd sub nom. *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Balogh*, 157 F.2d 939, 944 (2d Cir. 1946), vacated on other grounds, 329 U.S. 692 (1947).

The motion is denied.

SO ORDERED.

Dated: April 14, 1969

INZER B. WYATT
United States District Judge

August 25, 1969,
10 A.M.

Before:

Inzer B. Wyatt,

District Jury and a Jury.

APPEARANCES:

Robert M. Morgenthau, United States Attorney,
For the Government,
By: Peter F. Rient, Esq., and
Charles Updike, Esq., Assistant U.S. Attorneys

Conrad J. Lynn, Esq., and
Barbara Rowan, Esq.,
For the Defendant

* * *

[2] (In the robing room)

THE COURT: I thought it better to give counsel some of my views on the law before we have opening statements, otherwise there might be objections during the opening statements which either would require that the jury be excused or that we have a side bar conference. I want to avoid that.

Mr. Lynn, my remarks really are addressed primarily to you because you represent the defendant, and you have a point based on his beliefs and based on Judge Wyzanski's decision, but after reading the cases, I think as far as any defense based on this defendant's views is concerned, that your point will have to be made to a higher court. I don't believe that, for example, [3] evidence that he believed that the Vietnam war is illegal or immoral or that he would be wrong to participate in it, or in humanism as applied to this matter, or anything else, is admissible.

I think that the only point at which those matters, so far as this trial is concerned, become of any significance is in your point, if you urge it, as I assume you will, that there was no basis in fact for the classification of this defendant,

that is, for refusal to give him a conscientious objector classification, that question is for the trial judge and should not be submitted to the jury and at a point when that matter is raised, I will excuse the jury and I will hear you on that point.

I have examined the Selective Service file of the defendant which was made available to me over the weekend by the United States Attorney. I did that to become familiar with it, but I am prepared to hear your arguments in the absence of the jury.

It seems to me, therefore, that as far as the jury is concerned, the only issue is whether this defendant knowingly failed to report, and I have given you my definition in my explanation to the jury this morning. It makes a very narrow issue to be tried to [4] a jury, and it circumscribes you, I appreciate, enormously, but that's my view of the law, and the record will show that differs from your view so that it can be raised in an upper court.

* * *

[9] THE COURT: Well, I don't either, but one thing that he wants to do is he wants to say that under the Estep case that there was no basis in fact for the refusal to give the defendant a conscientious objector classification.

MR. LYNN: Right.

[10] THE COURT: And that is a question I have to decide, and not the jury.

* * *

[20] MR. LYNN: Now, if the Court please, I assume that the government is not submitting anything further to your Honor on whether the board had a basis in fact for its classification.

THE COURT: I understand the government is relying on the file itself, is that right, Mr. Rient?

MR. RIENT: That's correct, your Honor.

THE COURT: All right.

MR. LYNN: Now, before I call the defendant to the stand I want to ask the Court's ruling on the position that

we take, that is, under Article 3 of the United States Constitution, the Supreme Court and the inferior Federal Courts are created with a jurisdictional basis, in law and effect, that the defendant, as your Honor has indicated, his objection to service being based on his view that the war is immoral and illegal because it hasn't been declared, among other things, is not permitted to testify about that position, and I say that to deny him the right to do that is a violation of the Fifth Amendment in that it denies him due process of law, the right to put in his defense to a criminal prosecution under the Constitution.

THE COURT: No, I can't sustain that objection. I adhere to my ruling.

[23] THE COURT: All right.

(Pause)

* * *

THE COURT:. . .[1] If you want to present evidence as to what was put before the board at his personal appearance to supplement the file, I think that would be proper. I don't think anything else would be proper.

Now you can make whatever offer you would like to make to preserve your point in the record, but that's my view on the question of evidence, do you understand?

MR. LYNN: Yes, I understand, your Honor.

If the Court please, at this time the defendant makes an offer of proof as to his appearance before the [24] Draft Board. That offer consists of–

THE COURT: No, I will permit you to have him testify to that, to what took place before the board at his personal appearance. I will permit that.

MR. LYNN: All right.

THE COURT: And if you want anything else besides that, I will rule it out, but you have a right to make an offer of proof. It is not necessary to make an offer of proof as to what Mr. Gillette told the board because I will hear him on that.

GUY P. GILLETTE, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LYNN:

Q. Where do you live, Mr. Gillette? A. 133 Mountaindale Road, Yonkers, New York.

Q. Now, you registered for the draft? A. I did, yes.

Q. When was that? A. On my 18th birthday.

Q. Do you remember the year? A. Yes. It was—well, I'm 23 so it was five years ago.

[25] Q. Now, Mr. Gillette, did there come a time that you made application to be classified as a conscientious objector to your local board? A. Did there come a time?

Q. Yes. A. Yes. It was in April of '67.

Q. And you wrote a letter to the board? A. Right.

Q. Now, after that, did you have a hearing before that application was acted upon? A. It was sent first—I had to appeal first to the New York State board, and they requested the local board give me a hearing first.

Q. And then it was after you had appealed to the state board that you were granted a hearing? A. Correct.

Q. Before the local board? A. Right.

Q. Do you remember when that was? A. Not the exact date.

Q. Was it in July, 1967? A. I believe so, yes.

Q. Now, at the time that you—did you appear alone?

[26] A. Yes, I did.

Q. And how many members of the board were sitting? A. I believe there were four—four or five.

Q. Now will you tell the Court what was said to you and what you said to the members of the board, to the best of your recollection? A. Well, approximately they asked me if I was opposed to all war and I said yes, that I was. Then they said, but are you specifically opposed to the war in Vietnam. I said I am, yes, because that's the war I am faced with. That's the only war that I have to contend with at the time. I don't have to worry about any other war so I said yes, I am opposed to the war in Vietnam. And then I believe they asked me "Would you serve as a non-combatant in the United States Army?" And I told them that I wouldn't because I felt that was aiding the war effort, which

I was opposed to.

Then they asked me "Would you accept civilian duty in a hospital, or that type of civilian duty," and I said yes, that I would.

Then they were talking about my religious beliefs. They said, "You know, is your religion, are you basing this on your religion," and I explained that my religion was a humanist—it was based on [27] a humanist approach to religion, that it wasn't a more or less recognized religion, and I said that I believe that man is totally responsible to himself for what he does, and that the responsibility is up to me to make a decision as to whether I will kill another man. And I brought up the Nurenburg charter and I said that it had been, you know, several government, United States government officials had signed and agreed that the Nurenburg charter was fully to be abided by, and I recall in school that there was always one of the main things that was brought out against the Germans was that they didn't stand up on their own moral convictions and say that they would not fight in an unjust war. And I remember very vividly a teacher that I had in school saying that this was something—

THE COURT: Is that what you told them?

THE WITNESS: I was discussing this yes.

THE COURT: What we want, Mr. Gillette, is what you told the board at this personal appearance.

THE WITNESS: I told them that I was responsible to my conscience.

Q. Did you tell them about this teacher that you were just talking about? A. No, I don't believe that I did. [28] Q. Just stick with what you actually said to the board and what they said to you? A. Right.

Q. Yes, Go ahead. A. I told them what I just said about the Nurenburg charter, and as I recall, there was no statement at all either way to any of these things except, you know, yes and no, and they were just agreeing. And I believe that that was about all that transpired between us and they said okay.

I do recall that they—only one member of the board was paying strict attention to me. The other members were doing paper work at the time.

Q. Well, now, you said there were five members sitting. A. I believe that there were four or five. I really don't recall the exact number.

There was also a stenographer. I don't know where that record is. I assume that there was some type of record because she was taking notes, and if that is not in the file I don't know what happened to it.

Q. Now, Mr. Gillette, did any member of the board give an opinion as to what he thought about your grounds at that time? [29] A. There was no opinion at all except—the only opinion actually that I remember them giving at all was when I said that I would not serve as a non-combatant in the Army one of the members sort of gave a sarcastic laugh and said, "I thought so" and that was all. There was no reason given, there was nothing given. They just well, well, thank you very much. And that was it.

Q. And how long after that did you get a notice of their decision? A. I imagine it was about a week or two later. I don't know the exact time that expired.

Q. You didn't submit any other witnesses to the board at that time? A. As I recall, they didn't allow any witnesses. My father was there. My father was present. They wouldn't allow him in the room. He was told that I could have no witnesses at all.

Q. Now, did the board bring up to you any correspondence they had had with your references? A. They brought up nothing. They were working, as I said, on some other files. I don't understand quite why.

MR. LYNN: That is all.

[30] THE COURT: All right. Any questions, Mr. Rient?

MR. RIENT: Yes, a few.

THE COURT: All right. Wait a second, Mr. Gillette.

CROSS EXAMINATION BY MR. RIENT:

Q. Mr. Gillette, I show you what is part of Government's Exhibit 1 and what is marked as 37 in the upper right-

hand corner and ask you if that refreshes your recollection as to the date on which your personal appearance took place? A. Well, it says August 8th. I imagine that was the time.

Q. Is it your recollection now that the appearance took place in August as opposed to July, 1967? A. I suppose so. As I said, I don't recall the exact date.

Q. Do you recall, Mr. Gillette, whether you discussed with the members of the local board the time at which your opposition to war crystallized in your mind? A. I believe that I had said over the last few years I had become, you know, seriously involved, naturally since it was confronting me, you know, and I was becoming, you know, more aware of happenings in the world.

[31] Q. Did you tell the members of the board that your opposition to war stemmed more or less from the Vietnam war? A. I said that I am opposed to all war but that I am specifically opposed to the Vietnam war at the time because that's the war that I am faced with.

Q. Did any member of the board ask you whether you would fight to defend this country if it were attacked? A. I don't believe so.

Q. Do you recall whether, in your Selective Service Form 150, in which you applied for conscientious objector status, you indicated that you might fight in defense of this country if it were attacked? A. Yes, I did.

Q. Did you also indicate in that form that you might fight to enforce a decision by a majority of the United Nations against the country accused of breaking the peace? A. Right, that's correct.

Q. And you executed that Form 150 approximately when? A. April of 1967.

Q. I show you what has been previously marked as part of Government's Exhibit 1 and it bears the [32] number 18 on the top right-hand corner. Directing your attention to page 4 thereof, does your signature appear thereon? A. Yes.

Q. And is there a date there? A. Yes, May 8th.

Q. Is that the date you executed this form? A. I guess so, yes.

Q. So you signed this form three months prior to your appearance before the board, is that right? A. Yes.

MR. RIENT: May I have a moment, your Honor?

(Pause)

Q. Mr. Gillette, you testified earlier that during your appearance before the board only one of the members seemed to be paying attention and that the others were working on other matters, is that correct? A. That's correct.

Q. Could you see what they were working on? A. It seemed to me it was draft files. I really don't know. I didn't pay that much attention to what they were working on.

Q. So you don't know what things they were working on? [33] A. It was piles stacked in front of them. It couldn't have been pertaining to me.

Q. Merely because they had other files stacked in front of them doesn't mean that they weren't paying attention to your case. A. Well, I assumed it meant something to do with another person's armed forces record in some way. They were definitely writing with pens, pencils and going from one sheet to another.

MR. RIENT: No further questions, your Honor.

THE COURT: Mr. Lynn, anything else?

MR. LYNN: That is all your Honor.

THE COURT: Thank you, Mr. Gillette. You may step down.

(Witness excused)

* * *

[36] MR. LYNN: The summary, at the end, which they [the draft board] made on August 8th, reads "Registrant stated his conscience won't let him fight in Vietnam. Registrant also stated he could not honestly say he would not defend his country if it were attacked. He very well might fight the country being attacked. His main source of information which brought about these beliefs was from the news media in respective publications on the war. Reg-

istrant is opposed to military service in the case of the Vietnam war. Registrant formed his beliefs in the past two years or so and is more or less a result of the Vietnam war."

* * *

[42] THE COURT: Well, now, the argument made by Mr. Lynn is ably put and is supported to some extent at least, if not entirely, by Judge Wyzanski's opinion.

Whether there are distinctions in fact between the case before Judge Wyzanski and this one I can't say.

I do believe that from what was before the board there was a basis in fact for a conclusion by the board that aside from any question of sincerity, the views of this defendant were primarily, if not entirely, based on an opinion, a feeling, a belief, that the Vietnam war is immoral and unjust. And that those opinions had been formed after the registration, which I think was in 1964, and having so concluded, as a matter of fact, I think the board could make no further finding but that those views did not meet the specifications laid down by Congress for determing a conscientious objector. Those standards being found[43] of course, in Volume 50 Appendix of the United States Code, Section 456, subsection J.

If I understand Judge Wyzanski's opinion correctly, he says that if a person believes sincerely on moral grounds that the Vietnam war is unconscionable, that he is entitled by virtue of that fact, to a conscientious objector classification under any stature conforming to the Constitution.

I believe his opinion recognizes that the statute to which I have referred does not permit a conscientious objector status to a person with such views directed to the morality of a particular war such as the Vietnam war. And therefore he says the statute is unconstitutional.

If I have correctly understood Judge Wyzanski's views, then with great respect I must differ from him, and I decline to follow the decision.

In consequence, having found the basis in fact for the board's classification of the defendant as 1A, I believe that the trial must proceed with the limitations as to defenses

and consequently as to evidence which I have already indicated.

MR. LYNN: As I understand your Honor, you are ruling that because there is no basis in the statute [44] for moral as opposed to religious objection, therefore the board had a right to conclude that.

THE COURT: No, I made it plain that I think that there was a basis in fact for the board concluding that whatever moral views were held they were directed to the Vietnam war, and I don't believe, differing from Judge Wyzanski, I don't believe that that gives a constitutional right to an exemption as a conscientious objector.

* * *

[61] MR. LYNN: At this time your Honor, the defendant moves to dismiss the indictment upon the ground that the government has failed to prove a prima facie case.

The government put in evidence and elicited testimony that this defendant had registered for the draft, and then it put in an order to report for [62] induction, and his reply to that report for induction, but the government didn't show, as a necessary element of a prima facie case in this instance, that this defendant was eligible for service, in other words, the government failed to show that this defendant was classified in a category that required him to report for service.

THE COURT: Well, I ruled that the order of the board which had been put in evidence was valid, and therefore the matter is at rest, and there is no question in my mind but that any ruling that the order is valid is the law of the case, and therefore I think I will have to deny your motion.

MR. LYNN: The jury, however, is entitled to have before it the question of whether this person has been classified properly to be called for induction, and there has been no evidence before the jury that this person was classified in any way making him responsible to report under an order of induction. And I think that the fact that your Honor knows this is not a matter that is before the jury.

THE COURT: No. The jury has nothing to do with the

validity of the order as I read this decision in Cox v. The United States to which we referred this [63] morning. I think that's entirely for the Court. It would be improper for me to submit to the jury any question about the validity of the order.

* * *

GUY P. GILLETTE, called as a witness in his own behalf, having been first duly sworn, testified as follows:
DIRECT EXAMINATION BY MR. LYNN:

* * *

[64] Q. Now, you saw the letter that was marked as Government's Exhibit 1—did you receive this letter marked 1B dated December 22, 1967? A. Yes, I did.

Q. And did you answer that letter? A. Yes.

Q. And is this your answer to the letter of the Draft Board? A. Yes, it is.

* * *

Q. What is the date of that letter? A. December 27th.

Q. What year? A. 1967.

Q. Will you read that letter to the jury?

MR. RIENT: I object, your Honor.

THE COURT: Sustained.

Q. Now Mr. Gillette, were you ever classified as a conscientious objector? A. No, I wasn't.

Q. What was the date that you were to appear for induction? A. It was December 14, 1967,

Q. And did you go to the Yonkers board and appear for induction on that day? A. I don't think so, no.

Q. And at that time did you believe that you were within the law? A. Yes, I did.

MR. RIENT: Your Honor, I think—

THE COURT: Do you object?

MR. RIENT: Yes.

THE COURT: Sustained. The jury will disregard the answer.

MR. LYNN: That is all.

THE COURT: Any questions, Mr. Rient?

CROSS EXAMINATION BY MR. RIENT:

Q. Mr. Lynn, were you classified 1A–excuse me– Mr. Gillette, were you classified 1A at the time you received the order to report for induction? A. Yes, I was.

Q. There is no question but that you did receive the order to report, is there? A. No.

Q. Mr. Gillette, I show you the indictment in this case and I ask you whether you understand what is charged in this indictment? A. Yes, I do.

MR. LYNN: If the Court please, I will object to that because it calls for a conclusion.

THE COURT: Your objection is sustained. The jury will disregard the answer.

Q. Mr. Gillette, you knew, when you received the order to report for induction, that you had to report for induction under the law, didn't you? A. No.

Q. You thought that the order was meaningless? A. No. In my opinion the order was incorrect.

Q. Incorrect? A. It was unjust, let's say. That was my opinion.

Q. But you didn't have any doubt, did you, as to what was required of you by the order, did you? A. I had no doubt what they wanted me to do, no.

MR. RIENT: No further questions, your Honor.

THE COURT: Mr. Lynn?

MR. LYNN: No further questions.

THE COURT: Thank you, Mr. Gillette, you may step down.

* * *

[75] MR. LYNN: Now the government asked him to identify and introduce in evidence a letter from his board asking him why he didn't report for induction, and that letter in evidence dated December 22, 1967, reads:

"Mr. Guy Porter Gillette, 133 Mountaindale Road,

Yonkers, New York:

Dear Sir:

You are hereby notified to inform this Local Board as to the reasons why you didn't report for induction as scheduled on order to report for induction SS Form 252 which was mailed to you on November 29, 1967, scheduling your induction for December 14, 1967. We urge an immediate reply to this letter. By direction Local Board No. 8, Eileen Gannon, Clerk."

And the government also has introduced into evidence for your examination and consideration the letter in reply by this defendant dated December 27, 1967. Local Board No. 8. 45 South Broadway, Yonkers, New York:

"Dear Sirs:

In answer to your letter of December 22nd I didn't appear for induction as scheduled because of reasons stated in my application as a conscientious objector. These reasons are that on the basis of individual conscience as set forth in the Nurenburg charter I cannot serve in support of war, in particular, in the war in Vietnam which I feel is injust and illegal. Fundamental questions of life, the infliction of pain, suffering or death on other people is to me against all principles of my humanist belief. I believe that the defense of ethical values should be a persons supreme aim in life. This belief is basic in the lives of many individuals and of the Society for Ethical Culture. Each individual faces a personal dilemma many times in his life, but burely if one's life is a whole and is not compartmentalized he must live by the same values which support and answer these fundamental questions. By what right may I take another's life or destroy his family and home? The only moral or religious reality for me is to ask that I cannot."

You have not before you the question whether this young man was properly classified as a conscientious objector.

That is not before you. The only purpose in bringing this to your attention is for you to be able to have some insight whether not only did this young man not report, but this being a felony charge, whether he had the intent to disobey law, or was he moved by other motives.

[77] THE COURT: No, I can't permit that. That question of intent is not for the jury. The question for the jury is solely knowingly, and as I will instruct the jury later, the purpose of offering and receiving the letter from the Local Board to Mr. Gillette, and his reply was solely to show that in fact he did not report for induction and knew that he hadn't reported for induction. His reasons why he didn't report for induction as given in the letter, and whether he genuinely believed those reasons or not, is wholly besides the point and has no possible connection with this case.

MR. LYNN: And as I understand your Honor, you are now ruling that the jury cannot consider the question of intent.

THE COURT: Not consider the question of intent as you put it. They can only consider the question of whether his refusal to report for induction was done knowingly. His motives, his beliefs, his reasons, and whether they were moral or otherwise, or good, or worthy or unworthy, as I will tell the jury later, has nothing to do with this case.

MR. LYNN: I have nothing further to say, your Honor.

* * *

United States District Court
FOR THE
[illegible]

United States of America
v.
GUY FORTIS GILLIAMS

No. 69 Cr. 97

On this 25th day of August, 1969 XIX came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury

has been convicted of the offense of unlawfully and knowingly failing, neglecting and refusing to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, in that he, being a registrant, to whom an order to report for induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly failing, neglecting and refusing to report for induction into the Armed Forces of the United States. (Title 50 Appendix, United States Code, Section 462(a))

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS.

The defendant is continued on his own recognizance until September 22nd, 1969 at 10:30 a.m., at which time he is to surrender to the U. S. Marshal for service of sentence.

MICROFILM
AUG 26 1969

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant

Unite[illegible] State[illegible] District Judge.

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 359—September Term, 1969.

(Argued December 11, 1969 Decided January 9, 1070.)

Docket No. 34021

UNITED STATES OF AMERICA

Appellee,

against

GUY PORTER GILLETTE,

Appellant.

Before: MOORE and KAUFMAN, *Circuit Judges;* RYAN,* *District Judge.*

Appeal from a judgment of conviction for refusal to report for induction into the armed services, in violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68). The judgment was entered in the United States District Court for the Southern District of New York on August 25, 1969, after a one-day trial before Inzer B. Wyatt, *Judge,* and a jury. The defendant was sentenced to a term of imprisonment of two years.

Affirmed.

Conrad J. Lynn, New York, N. Y., *for Appellant.*

Harold F. McGuire, Jr., Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Peter F. Rient, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellee.*

Per Curiam:

Guy Porter Gillette was ordered to report for induction into the armed forces on December 14, 1967. He failed to report as ordered and did not submit to induction. At his trial for violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68) his sole defense was that he should have been classified as a conscientious objector. He based his attack on the validity of his I-A classification not on any procedural irregularity but on a contention that the provision of the Military Selective Service Act of 1967 which allows exemption for conscientious objectors[1] is unconstitutional as applied to him. At a pre-trial hearing, Judge Wyatt ruled that evidence as to Gillette's belief that American intervention in Vietnam was unconstitutional, illegal or immoral would be inadmissible. Finding the induction order to be valid, Judge Wyatt limited the jury trial to the issue of whether Gillette's failure to report was knowing and willful.

Evidence derived from Gillette's selective service file and from his testimony before Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam. His position seems to include a willingness to defend his homeland if it were attacked and to fight to enforce a United Nations decision against a country accused of breaking the peace. Judge Wyatt found that Gillette's views were based "on an opinion, a feeling, a belief that the Vietnam war is immoral and unjust" and that the draft borad could properly conclude that "those views did not meet the standards laid down by Congress for determining a conscientious objector." He expressly refused to rule that the board had denied the request for exemption because Gillette's views were non-religious:

"The consitiutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Lichter v. United States*, 334 U.S. 742, 755-58 (1948); *Selective Draft Law Cases*, 245 U. S.

366 (1918). The exercise of this power to conscript and train men does not depend on the contemporaneous existence of a war. It may be exercised in time of peace. *United States v. Henderson*, 180 F.2d 711, 713 (7th Cir. 1950). We reaffirm our holdings in *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966) and *United States v. Bolton*, 192 F.2d 805 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, international treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot successfully challenge the legality of the war in Vietnam in these proceedings.

The contention that the conscientious objector provision of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j), is unconstitutional as applied in this case is based on the recent decision of Judge Wyzanski in *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *prob. juris. noted*, 38 U.S.L.W. 3113 (U. S. Oct. 14, 1969) (No.305). The future effect of that decision upon the application of the Act to so-called "selective" conscientious objectors and "non-religious" conscientious objectors must await a determination by the Supreme Court. In this connection we note that there was no finding below as to whether Gillette's views were "by reason of religious training and belief" or were "essentially political, sociological, or philosophical." Even assuming that his views were "religious" as that word is construed to insure the constitutionality of the Act, the Act requires opposition "to participation in war in any form." To exact such a prerequisite for exemption from induction into the armed forces is not to overstep the powers granted to Congress to raise and support armies. The mere potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh the application of this exercise of Congressional power to him. See *United States v. Henderson, supra; United States v. Bolton, supra. Contra, United States v. Sisson, supra*, at

906-11.

Gillette also asserts that there was error below in the refusal to allow him to explain his reasons for not appearing for induction to the jury and in the denial of his motion to dismiss fc failure to prove a prima facie case. We find no merit in these contentions.

The conviction is affirmed.

• Of the Southern District of New York, sitting by designation.

[1] 50 U.S.C. App. § 456(j) (Supp. IV, 1965-68) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

GUY GILLETTE
133 mountaindale road yonkers, n. y. spencer 9-4684

April 29, 1967

Local Board No. 8
45 South Broadway
First Floor, Room 111
Yonkers, New York

Dear Sirs,

I am requesting the classification of conscientious objector on the basis of the following reasons:

1) I believe that the United States Government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice. President Franklin Roosevelt and Winston Churchill declared in the Atlantic Charter that: "they desire to see no territorial change that does not accord with the freely expressed wishes of the peoples concerned. They respect the right of all peoples to choose the form of government under which they will live."

a) Under th Treaty of London of 1945 (Nuremberg Charter) which outlaws the "waging of a war of aggresion" and makes soldiers individually responsible as war criminals, even is they are acting under orders. This Treaty was signed by representatives of the United States government.

b) The Treaty of London further states that official positions, superior orders, or positions limited to that of an accomplice, do not free an individual from responsibility and punishment.

2) I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism". This essentially means respect and love for man, faith in his inherant goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition.

Religion of Humanity: "holding that mans duty is chiefly or wholly comprised in the advancment of the human race." - The Oxford Universal Dictionary.

I would like to request that you send me a Form 150.

Sincerely,

/s/ Guy Gillette
30 8 45 523

Local Board No. 8
45 South Broadway

May 1 1967

Room 111, 1st Floor
Yonders, N.Y. 10701

Local Board No. 8
45 South Broadway

AUG 17 1967

Room 111, 1st Floor
Yonkers, N.Y. 10701

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

LOCAL BOARD NO. 8
40 South Broadway
ROOM 111, 1ST FLOOR
YONKERS, N. Y. 10701

MAY 1 1957

Room 111, 1st Floor
Yonkers, N.Y. 10701

(Local Board Stamp)

THIS FORM MUST BE RETURNED ON OR BEFORE
May 12, 1957

Date of mailing of form: MAY 2 1957
Date received at local board: May 12, 1957

1. Name of Registrant			2. Selective Service No.
GILLETTE,	GUY	PORTER	30 8 45 523
(Last)	(First)	(Middle)	
3. Mailing address: 133 Mountaindale Road	Yonkers,	West. New York	10710
(Number and street or R.F.D. No.)	(City or town)	(County)	(State)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire, SSS Form No. 100.

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector: *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

Refer to Original Statement

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

Refer to Original Statement. Guy Porter Gillette

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☐ Yes ☐ No. I neither affirm nor deny.
2. Describe the nature of your belief which is the basis of your claim made in Series I above. (Explain what, if anything, you believe to be a Supreme Being involves the duty which to you takes precedence over duties arising from any human relation.)

Refer to Original Statement, which I have already sent the Local Board No. 8 and attached Skeleton following page.

SSS Form No. 150

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

From my parents and life experience.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

There is no such one person.

5. Under what circumstances, if any, do you believe in the use of force?

For the personal protection of self and other individual persons.
To enforce a decision, by a majority of the United Nations, against a country accused of violating the peace, or the direct defense of my country.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

See statement originally sent to Local Board #8.
I have tried to live a decent law-abiding life with an awareness of the world situation, and I believe in the betterment of mankind.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

Refer to original Statement, which I have already sent the Local Board No. 8.

I have participated in a number of peace movement demonstrations, and have discussed freely my convictions when the opportunity has arisen.

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended From—	To—
Yonkers Elementary Schools	Public	Yonkers, N.Y.	1951	1960
Roosevelt High School	Public	Tuckahoe Rd., Yonkers	1960	1963
New School for Social Research	University	66 West 12th St. N.Y., N.Y.	1964	1965
Neighborhood Playhouse School of the Theatre	Professional	340 East 54th St. N.Y., N.Y.	1965	1967

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

	Type of Work	Name of Employer	Address of Employer	Period Worked From—	To—
①	Sculptors Assistant	Jan Peter Stern	14640 Mitchell Rd. Santa Monica Calif.	1963	1964
②	Photographer	Vernon Pope Co.	1270 6th Ave. N.Y., N.Y.	1964	1964
③	Ranchhand	Watt Mathews	Lambshead Ranch Albany, Texas	1964	1964
④	Musician	Self		1965	1967

Series II – Religious Training & Belief

(2) Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings, is not dependant upon being a member of a specific Religious Sect or organization.

The following quote from John Haynes Holmes expresses my feelings very well:

over →

3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence	
			From—	To
Lovelady	Texas	Box 176	1945	1946
Staten Island	New York	139 Tamarack Rd.	1946	1951
~~Yonkers~~			19	19
			19	19
			19	19
			19	19

4. Give the name and address of your parents and indicate whether they are living or not.

Guy Gillette 133 Mountaindale Rd. Yonkers, N.Y. Living
Doris Gillette " " " " " Living

5. (a) State the religious denomination or sect of your father Ethical Movement
(b) State the religious denomination or sect of your mother " "

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

No

2. Are you a member of a religious sect or organization? ☐ Yes ☑ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

Boy Scouts of America — member

Series, II - Continued

(2) cont'd.

"Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands.... it is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best."

---

(3) Series V. - References Continued ✓

Father Donald S. Cheetham

Address> Sweet Chaly Beeite via Covington, Virginia.

Occupation> Clergyman

Relationship> Family Friend

(4) Rev. Charles W. Stipek

Address> William Wisker Hollow, West Hartland, Conn.

Occupation> Clergyman

Relationship> Stepgrandfather

(5) Mr. Sidney Shore

Address> Vernon Pope Co.
1270 6th Ave. New York, N.Y.

Occupation> Vice President of Public Relations Company.

Relationship> Family Friend

(6) Mr. Samuel Reiter

Address> % Reiter & Dulberg
157 W. 54th New York, N.Y.

Occupation> Business Executive
President Reiter & Dulberg Corp.

Relationship> Family Friend

[Letters to Follow From above individuals.]

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship to You
Mrs. Charles W. Stiffen Gertrude Stumm	William Whitaker Hillsboro, Conn. 365 West 23rd St. NY, N.Y.	Housewife Director of Public Relations Fellowship of Reconciliation Agencies.	Grandmother Friend

(See attached note for References 3-6)

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, Guy Porter Gillette, certify that I am the registrant named and described in the foregoing statements in this form; that I have read or have had read to me the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are (are, are not) in my own handwriting.

Registrant sign here ☞ Guy Porter Gillette
(Signature or mark of registrant)

May 8, 1967
(Date)

(Signature of witness to mark of registrant)

(Date)

(Signature of witness to mark of registrant)

(Date)

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

(4)

U.S. GOVERNMENT PRINTING OFFICE: 1966—O-238021

December 27, 1967

Local Board No. 8
45 South Broadway
Yonkers, N.Y.

Dear Sirs,

In answer to your letter of December 22, I did not appear for induction as scheduled because of reasons stated in my application as a Conscientious Objector. These reasons are, that on the basis of individual conscience (as set forth in the Nuremberg Charter), I cannot serve in support of war. In particular the war in Vietnam, which I feel is unjust and illegal. Fundamental questions of life: the infliction of pain, suffering or death on other people, is to me, against all principles of my Humanist belief. I believe that the development of ethical values should be a persons supreme aim in life. This belief is basic in the lives of many individuals and of The Society for Ethical Culture.

Each individual faces a personal dilemma many times in his life, but surely if ones life is a whole and is not compartmentalized, he must live by the same values which support and answer these fundamental questions: by what right may I take anothers life, or destroy his family and home? The only moral or religious reality for me, is to answer that I cannot.

Sincerely,

/s/ Guy P. Gillette 30 8 45 523

THE FIRST CHURCH IN HARTLAND
Congregational
East Hartland, Conn.

May 17, 1967

Local Board No. 8
45 South Broadway
Room 111, 1st Floor
Yonkers, New York, 10701

The Chairman, Local Draft Broad:

This is in reply to your letter of May 16, 1967, requesting information regarding the sincerity of the claim of Guy Porter Gillette to be a conscientious objector and his appeal to be classified as such at this time.

I have known Guy Gillette from his earliest childhood. In all my contacts and conversations with him, I have always found him to be serious-minded and utterly honest. More than what is usual in youth, he has been inclined to be very sensitive to the deeper meanings of life and in his regard for them. Often, even as a child, I found him asking the profounder question which more adult minds missed or lightly dismissed.

As to his present claim to being a conscientious objector, *I believe it to be primarily related to the war efforts in which our country is now engaged. I have spoken with him frequently over the past few years concerning them and I cannot agree with his evaluation of our commitment and obligation as a nation.* I do not, however, question the sincerity with which he holds his position, nor with his conviction that to support them by bearing arms would both be a basic personal betrayal of what he believes and detrimental to the nation's welfare. This has been a burdensome and agonizing matter with him which he has sought to resolve objectively and, at whatever cost to himself, he feels he must maintain responsibily and with a sense of duty. I only regret that his orientation has been *such that he cannot see it differently.*

His objection on the basis of religious conviction, I believe to be secondary but of longer standing and of more significance. And again, I would disagree with the conclusions to which he, in good conscience and to the best of his ability, has come. Yet in my twenty years as a chaplain in the military service, and consultations on the subject of conscientious objection, I have seldom encountered a more earnest and selflessly honest soul-searching appraisal. It is devoid of any thought of evasion of duty, expediency or personal consideration. Nor does it involve pacifism as a social or political technique, or the authority of an organized religious body. Rather, it is based on a fundamental regard for human life as sacred which he feels conscience-bound to uphold. The basic evil of war to impersonalize and destroy this ultimate evaluation of human life, I feel, is the motivating source for his conscientious objection.

I am firmly convinced, therefore, that the conscientious objection held by Guy Gillette is held in the utmost sincerity and is of the highest order, and I would unqualifiedly support him in it.

Sincerely yours,

/s/ Rev. Charles W. Stipek

Local Board No. 8
45 South Broadway

MAY 19 1967

Room 111, 1st Floor
Yonders, N.Y, 10701

Local Board-Southern
45 South Broadway

AUG 17 1967

Room 111, 1st Floor
Yonkers N.Y. 10701

3807 E. Jefferson
Seattle, Wash.

May 17, 1967

The Chairman
Local Draft Board
Yonkers, N.Y.

Dear Sir:

I am writing to support the claim of Guy Porter Gillette as a conscientious objector.

It has been my priviledge to know his parents for twenty seven years and *to know Guy since the day of his birth.* In fact I am the young man's godfather.

As a child he was always serious, honest and straightforward. In his formative years he has proved himself to be a young man of strong principles and integrity and of a moral character beyond reproach. His present stand is not that of the coward or the draft dodger. On the contrary it is an act of extreme courage. It is not easy to take a stand that exposes him to the easy accusation of being unpatriotic, even when his stand is born of *a deep love for America and a desire for a higher morality in her relations with other nations.*

Although the morality of our involvement in Vietnam is certainly less clear than our involvement in World War II, many American boys are fighting there with courage and honor. We must also admire the courage of those who in all honor dissent. Guy says that he is a humanist. God bless his humanism.

Yours,

/s/ Archie Smith

Local Board No. 8
45 South Broadway
MAY 25 1967

Room 111, 1st Floor
Yonkers, N.Y. 10701

Local Board-Southern
45 South Broadway

AUG 17 1967

Room 111, 1st Floor
Yonkers, N. Y. 10701

REITER-DULBERG LABORATORIES, INC.
PHOTOGRAPHIC SERVICES

157 WEST 54 STREET, NEW YORK, N.Y. 10019 - 212JU 2-6871

May 22, 1967

The Chairman
Local Board No. 8
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

Gillette, Guy Porter
SS No. 30-8-45-523

Dear Mr. Chairman,

In connection with your request for information concerning the above named registrant; permit me to make the following observation:

I have been acquainted with Guy for a number of years on a social level, being friends of the family; and also on a business basis with his father. Therefor I feel qualified to give an appraisal of his honesty; and I firmly believe *in his sincerity with respect to the crucial question of participation in this war.*

Respectfully yours,

/s/ Samuel C. Reiter

Local Board No. 8
45 South Broadway

MAY 23 1967

Room 111, 1st Floor
Yonkers, N.Y. 10701

Local Board-Southern
45 South Broadway

AUG 17 1967

Room 111, 1st Floor
Yonkers, N.Y. 10701

May 23, 1967

The Chairman, Local Draft Board:

I have known Guy Gillette, Jr. and his family for 10 years. In that time I have seen Guy mature; he is a thinking, feeling young man who reflects the kind of home in which he grew up. The influence of his parents is obvious. They have inculcated an awareness–and concern–for the world around him. I consider him to be a *compassionate human being, sensitive to the rights of others, involved with his fellow man.*

I respect Guy's integrity and courage. *At 21 he has the character–and yes, the guts–to take a stand which he believes to be right, though it is not a popular one at this time.* He is entitled to the right of dissent, as were the founders of this nation, who held "these truths to be self-evident; that all mean are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

There is absolutely no doubt in my mind that Guy loves his country and that he would defend it.

Sincerely,

/s/ Trudy Stamm

365 West 25 Street
New York, N.Y. 10001

Local Board No. 8
45 South Broadway
May 25, 1967
Room 111, 1st Floor
Yonkers, N.Y. 10701

45 South Broadway
Aug. 17, 1967
Room 111, 1st Floor
Yonkers, N.Y. 10701

from

GUY GILLETTE

May 25, 1967

Dear Sirs,

Please add these two letters to my file. You have the particulars on Miss Stamm, Mr. Smith is an actor in the Seattle Repetory Company, has been a friend of the family's for many years and is my godfather. His address is 3807 East Jefferson, Seattle, Washington.

Thank You very much.

Sincerely,

/s/ Guy Gillette 30 8 45 523

Local Board No. 8
45 South Broadway
May 25, 1967

Room 111, 1st Floor
Yonkers, N.Y. 10701

"Bounty"
Sweet Chalybeate
via Covington, Va.
June 1, 1967

Chairman
Local Board No. 8
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

In Re. GILLETTE, Guy Porter
S.S. No. 30-8-45-523

Dear Sir,

I have known this youth all of his life—I Baptised in infancy. I have known his parents for a little longer and I find this family sincere and loyal in all their dealings.

I am amazed at young Guy's thought on the subject of Pacificism as expressed in his answers to salient questions. It shows real concern for Christian neighbors, a great deal of hard study and soul-searching. It is true it might be based on a deeper and more historical religious conviction; but the Humanist position is succinctly put.

I therefore urge you to uphold in his decision; and I am willing to do anything in my power to attest to his faithfulness.

Sincerely,

/s/ (Fr.) Donald S. Cheetham
Episcopal Priest

Local Board No. 8
45 South Broadway
June 5 1967
Room 111, 1st Floor
Yonkers, N.Y. 10701

Aug. 17 1967
Room 111, 1st Floor
Yonkers, N.Y. 10701

VERNON POPE CO., Inc.
1270 Avenue of the Americas,
New York, N.Y. 10020

June 1, 1967

Miss Mary Golder, Assistant Clerk
Selective Service System–Local Board No. 8
45 South Broadway
Room 111, 1st Floor
Yonkers, N.Y. 10701

Dear Miss Golder:

In response to your letter of May 16, asking for information on Guy Porter Gillette (SS No. 30-8-45-523), I should like to say:

I have known the Gillette family for the past ten years. They are decent, good Americans–in the best sense of that term as I understand it.

During this period, I have seen Guy, Jr., grow from adolescence to young manhood. *He has always impressed me, even as a youth, as someone with strong, heartfelt convictions and I have no doubt of his sincerity as a conscientious objector.*

It is possible that I in no small measure contributed, unwittingly, to his feelings. I served in the Second World War in the U.S. Army Air Force. Guy and his younger brother were a fascinated audience for my stories about my war experiences–which were far from pleasant and included almost two years of imprisonment by the Germans, as well as being bombed by U.S. planes. Looking back, now, I realize how graphic I was about the horrors and, in many ways, the futility of war.

I hope that this has been of help to you.

Cordially,

/s/ Sidney Shore

SS:ck

Aug 17 1967
Room 111, 1st Floor
Yonkers, N.Y. 10701

37

NEW YORK STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM

Approved by Director
of Selective Service

SUMMARY OF APPEARANCE BEFORE LOCAL BOARD

Name of Registrant: Guy Porter Gillette Date of Appearance: AUG 8 1967
Selective Service No. 30-6-43-523
Local Board Member or Members present at meeting: John S. Nugent, Gumner Hallock, Fred Martin, John O'Donnell
Start of Hearing 7:35p.m.
End of Hearing 7:50p.m.
The registrant has an outstanding order to report for induction ( ) Yes (XX) No

Type of Appearance:

(XX) Procedural right under section 1624.1 of Selective Service Regulations.
( ) Discretionary interview.
( ) Meeting under section 1660.20(c) of Selective Service Regulations.

Present classification 1-A Desired classification 1-O

Other persons appearing: None

Oath (affirmation) taken by: John S. Nugent, Chairman — A Board-Southern
65 South Broadway

Action taken by local board:

AUG 17 1967

Room 111, 1st Floor
Yonkers, N. Y. 10701

(XX) The registrant's classification was not reopened.
( ) Postponed registrant's induction until
( ) Request permission from State Director to reopen registrant's classification.
( ) Classified registrant in Class .
( ) Type of civilian work appropriate for registrant to perform in lieu of induction into armed forces

Complete the following if applicable. If either of the following is checked, the opinion of the local board should be recorded on the Minutes of Local Board Meeting (SSS Form 112).

( ) It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction.

( ) It is the opinion of the local board that the registrant's beliefs matured after the issuance of his order to report for induction. (If such is the case, the local board is required to reopen the registrant's classification.)

NY FORM 7 (Sheet 1) (Rev. 4.20.67)

Oral information given by registrant or other persons appearing (indicate which) to assist the local board in classification. (If no additional information is submitted, so indicate.)

Registrant stated his conscience would not let him fight in VietNam.

Registrant also stated he could not honestly say he would not defend his country if it were attacked. He very well might fight in respect to the country being attacked.

His main source of information which brought about these beliefs was from the news media in respect to publications on the war.

Registrant is opposed to military service in the case of the VietNam War.

Registrant formed his beliefs in the past 2 years or so and is more or less a result of the VietNam war.

(Attach additional sheets if required)

Written information given by registrant or by other person appearing (indicate which) to assist the local board in classification: None

46 South Broadway

1507

Exhibit A

Exhibit B

Room 111, 1st Floor
onkers, N. Y. 10701

Exhibit C

Above summary prepared by P. J. Grace Clerk
(Name) (Title)

Date: AUG 9 1967 19

N Y FORM 7 (Sheet 2) (Rev. 4.20.67)

FILE COPY

FEB 11 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1969

No. [redacted] 85

GUY PORTER GILLETTE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONRAD J. LYNN,
Attorney for Petitioner,
401 Broadway,
New York, N. Y.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitution, Statutes and Regulations Involved	2
Statement	2
POINT I—The defendant had competence to question the legality of the war	3
POINT II—The Selective Service Laws provisions on conscientious objection renders it unconstitutional	5
POINT III—Errors in rulings on evidence require reversal	6
Appendix A	7
Appendix B	11
Appendix C	12

CASES CITED

Hart v. U. S., 391 U. S. 956	4
Holmes v. U. S., 391 U. S. 936	4
Krogman v. U. S., 225 F. 2d 220	6
U. S. v. Johnson, 254 F. 2d 175	6
U. S. v. Kahn, 381 F. 2d 824	6
U. S. v. Seeger, 326 F. 2d 846	5
U. S. v. Sisson, 297 F. Supp. 902	4, 6

STATUTES CITED

United States Constitution, Article III, Section 2	3

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1969

No. .....

GUY PORTER GILLETTE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays this Honorable Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 9, 1970 affirming the conviction of the appellant for failure to report for induction into the Armed Forces.

Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals for the Second Circuit was rendered on January 9, 1970 (Docket No. 34021) and appears in Appendix A, *infra*.

Jurisdiction

1. Judgment of Court of Appeals, dated January 9, 1970.

2. The jurisdiction of this Court is invoked under title 28 U.S.C. 1254 (1).

Questions Presented

1. Did appellant's claim raise a justiciable question?

2. Can a non-religious objector claim a 1-0 classification?

3. Can an objector mainly to the Vietnam war qualify as conscientious objector?

4. Is proof of intent as essential element of the crime charged?

5. Is the government required to prove classification as a part of its *prima facie* case?

Constitution, Statutes and Regulations Involved

The pertinent portions of the United States Constitution, Article 3, Section 2, Amendment 1, Selective Service Law, title 50 U.S.C., Appx. Section 456 are set forth in the Appendix at pages .

Statement

The appellant was convicted of refusal to report for induction into the Armed Forces in violation of the Selective Service Law of 1967. His sole defense was that he was a conscientious objector and that he should have

been classified as such. To prove that there was a basis in fact for the 1-A classification the government, in the absence of the jury, simply submitted the draft file of appellant in evidence. Appellant then took the stand, in the absence of the jury, and gave the substance of his stand against bearing arms. His conviction was based on humanism and was specifically directed against the war in Vietnam. The trial judge concluded that the draft board had, in effect, found that appellant's objection was to a particular war and that it, therefore, had a basis in fact for its ruling that appellant was not a conscientious objector within the meaning of the law.

Before the jury court ruled that intent need not be proved as a part of the government's case and declined to let the defendant state his intent in refusing to report. Furthermore, the court ruled that it was not necessary for the government to introduce any evidence of the classification of the appellant as a part of its *prima facie* case. The Court of Appeals affirmed conviction.

POINT I

The defendant had competence to question the legality of the war.

In communication with his draft board, appellant insisted that American intervention in Vietnam was unconstitutional and in violation of the treaty obligations of the nation. Was the appellant competent to assert this on his prosecution?

The United States Constitution, Article III, Section 2, provides in part:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . ."

It would appear, therefore, that the first inquiry of any court would be does the government have the right, in law, to call the citizen to service in the Armed Forces. Unfortunately throughout this war the Courts, almost without exception, have refused to rule on whether the war is being constitutionally waged and whether solemn treaties are being violated. This refusal denies a defendant due process of law because it bars him from introducing his basic defense.

Chief Judge Charles E. Wyzanski, Jr., of the U. S. District Court for Massachusetts, considered this question in *U. S.* v. *Sisson* (297 F. Supp. 902). The judge observed:

> "Those contentions as to the judicial power of the United States Courts are of the most serious nature. If defendant's other grounds for his amended motion in arrest of judgment do not prevail in the Supreme Court, that court will no doubt have to rule upon the new contentions with respect to judicial power, or to remand the case to this court for a ruling . . ."

It is clear, therefore, that some Judges are having second thoughts about so cavalierly brushing aside the real objections to service in the Armed Forces. This court has noted probable jurisdiction in the government's appeal in the cited case and a clear contradiction exists between this Circuit and the determination of Judge Wyzanski in the First Circuit. As Mr. Justice Douglas has observed in *Holmes* v. *U. S.*, 391 U. S. 936 and in *Hart* v. *U. S.*, 391 U. S. 956, this court has yet to decide squarely that Congress has the power to conscript in the absence of a declared war.

POINT II

The Selective Service Laws provisions on conscientious objection renders it unconstitutional.

In the statute on selective service preceding the present statute this court found that the definition of a religious objector discriminated among religions and that, therefore, it was unconstitutional as in violation of the First Amendment of the U. S. Constitution. *U. S.* v. *Seeger,* 326 F. 2d 846. The new statute eliminates the requirement that a person asserting a religious objection must believe in a Supreme Being. However, it makes it unmistakably clear that the objection must be religious, as distinguished from merely moral, philosophical, political or sociological opinions. In so doing Congress has clearly passed a law favoring an establishment of religion. Judge Wyzanski grasped the nettle courageously:

> "Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who whether they be religious or not, are motivated in their objections to the draft by profound moral beliefs which constitute the central convictions of their beings.
>
> "This court, therefore, concludes that in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' Torasco v. Watkins, 367 U. S. 488 . . ."

This conviction should be reversed because the indictment does not charge an offense. Again the Second Circuit disagrees with the ruling *U. S.* v. *Sisson, supra,* on this question.

POINT III

Errors in rulings on evidence require reversal.

The government's *prima facie* case before the jury consisted of proof that appellant had registered and that he had been called for induction and had failed to report. The government then rested.

The defense then moved for dismissal of the indictment upon the ground that the government had failed to prove a *prima facie* case. The motion was denied. It is submitted that the government must show in every case of prosecution for refusal to submit for induction that the defendant was classified 1-A at the time of his order to report.

Furthermore, the Court refused to permit the defendant to read his letter explaining his reasons for not appearing for induction to the jury. The government had introduced this letter into evidence. When the defense counsel pointed out to the court that intent was an issue on which the defendant could testify, the court disagreed and refused to permit any evidence on intent to be introduced. This was in clear violation of the weight of authority. *Krogman* v. *U. S.*, 225 F. 2d 220; *U. S.* v. *Johnson,* 254 F. 2d 175; *U. S.* v. *Kahn,* 381 F. 2d 824.

Wherefore, the conviction and sentence of the appellant should be reversed.

Respectfully submitted,

CONRAD J. LYNN,
Attorney for Petitioner,
401 Broadway,
New York, N. Y.

January 26, 1970.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 359—September Term, 1969.

(Argued December 11, 1969 Decided January 9, 1970.)

Docket No. 34021

UNITED STATES OF AMERICA,

Appellee,

against

GUY PORTER GILLETTE,

Appellant.

Before: MOORE and KAUFMAN, *Circuit Judges;*
RYAN,* *District Judge.*

Appeal from a judgment of conviction for refusal to report for induction into the armed services, in violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68). The judgment was entered in the United States District Court for the Southern District of New York on August 25, 1969, after a one-day trial before Inzer B. Wyatt, *Judge,* and a jury. The defendant was sentenced to a term of imprisonment of two years.

Affirmed.

* Of the Southern District of New York, sitting by designation.

CONRAD J. LYNN, New York, N. Y., *for Appellant.*

HAROLD F. MCGUIRE, JR., Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Peter F. Rient, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellee.*

PER CURIAM:

Guy Porter Gillette was ordered to report for induction into the armed forces on December 14, 1967. He failed to report as ordered and did not submit to induction. At his trial for violation of 50 U.S.C. App. § 462 (Supp. IV, 1965-68) his sole defense was that he should have been classified as a conscientious objector. He based his attack on the validity of his I-A classification not on any procedural irregularity but on a contention that the provision of the Military Selective Service Act of 1967 which allows exemption for conscientious objectors[1] is unconstitutional as applied to him. At a pre-trial hearing, Judge Wyatt ruled that evidence as to Gillette's belief that American intervention in Vietnam was unconstitutional, illegal or immoral would be inadmissible. Finding the induction order to be valid, Judge Wyatt limited the jury trial to the issue of whether Gillette's failure to report was knowing and willful.

---

[1] 50 U.S.C. App. § 456(j) (Supp. IV, 1965-68) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

Evidence derived from Gillette's selective service file and from his testimony before Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam. His position seems to include a willingness to defend his homeland if it were attacked and to fight to enforce a United Nations decision against a country accused of breaking the peace. Judge Wyatt found that Gillette's views were based "on an opinion, a feeling, a belief that the Vietnam war is immoral and unjust" and that the draft board could properly conclude that "those views did not meet the standards laid down by Congress for determining a conscientious objector." He expressly refused to rule that the board had denied the request for exemption because Gillette's views were non-religious:

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Lichter* v. *United States*, 334 U. S. 742, 755-58 (1948); *Selective Draft Law Cases*, 245 U. S. 366 (1918). The exercise of this power to conscript and train men does not depend on the contemporaneous existence of a war. It may be exercised in time of peace. *United States* v. *Henderson*, 180 F. 2d 711, 713 (7th Cir. 1950). We reaffirm our holdings in *United States* v. *Mitchell*, 369 F. 2d 323 (2d Cir. 1966) and *United States* v. *Bolton*, 192 F. 2d 805 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, international treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot successfully challenge the legality of the war in Vietnam in these proceedings.

The contention that the conscientious objector provision of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(j), is unconstitutional as applied in this case is based on the recent decision of Judge Wyzanski in *United States*

v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *prob. juris. noted*, 38 U.S.L.W. 3113 (U. S. Oct. 14, 1969) (No. 305). The future effect of that decision upon the application of the Act to so-called "selective" conscientious objectors and "non-religious" conscientious objectors must await a determination by the Supreme Court. In this connection we note that there was no finding below as to whether Gillette's views were "by reason of religious training and belief" or were "essentially political, sociological, or philosophical." Even assuming that his views were "religious" as that word is construed to insure the constitutionality of the Act, the Act requires opposition "to participation in war in any form." To exact such a prerequisite for exemption from induction into the armed forces is not to overstep the powers granted to Congress to raise and support armies. The mere potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh the application of this exercise of Congressional power to him. See *United States* v. *Henderson, supra; United States* v. *Bolton, supra. Contra, United States* v. *Sisson, supra*, at 906-11.

Gillette also asserts that there was error below in the refusal to allow him to explain his reasons for not appearing for induction to the jury and in the denial of his motion to dismiss for failure to prove a prima facie case. We find no merit in these contentions.

The conviction is affirmed.

Appendix B.

U. S. Constitution Amendment (1)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .

Appendix C.

Title 50 U.S.C. Appx. Sec. 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1170

GUY PORTER GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner, a non-religious selective objector to the war in Vietnam, who was classified 1–A by his local selective service board, was convicted of having wilfully refused to report for induction as ordered, in violation of 50 U.S.C. App. 462. He was sentenced to two years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A) on January 9, 1970. The petition for a writ of certiorari was not filed until February 11, 1970, and is out of time under Rule 22(2) of the Rules of this Court.

379-265—70

Petitioner contends that the statute (50 U.S.C. App. 456(j)) granting exemption only to those opposed to "participation in war in any form" is unconstitutional. An identical contention is before this Court in *United States* v. *Sisson,* No. 305, this Term. As pointed out in our brief in *Sisson,* even assuming *arguendo* the correctness of petitioner's constitutional arguments, he is at this stage (*i.e.* before receiving orders to go to Vietnam) without standing to assert his selective objector beliefs as a defense to his prosecution for failing to report for induction. However, assuming that this Court is disposed to overlook the untimeliness of the present petition, it may wish to defer disposition of the petition until after decision in *Sisson.*[1]

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

[1] Petitioner also contends that the court erred in allegedly refusing to permit him to introduce proof bearing on his intent to commit the crime, by reading his letter explaining his reasons for not appearing for induction. The letter was already in evidence. It corroborated the evidence showing the "wilfulness" of his refusal to report. In any event, his motive for this action was irrelevant.

U. S. GOVERNMENT PRINTING OFFICE: 1970

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SEP 16 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

CONRAD J. LYNN
401 Broadway
New York, N.Y. 10006

LEON FRIEDMAN
42 West 44th St.
Room 500
New York, N.Y. 10036

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, N.Y. 10019

MELVIN L. WULF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N.Y. 10010

Attorneys for Petitioner

I
EX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes and Regulations	2
Questions Presented olved	2
Statement of the Case	2
Summary of Argument	9
ARGUMENT:	
I. Welsh v. United S States v. Seeger, s, 398 U.S. 333 and United of the conviction U.S. 163 require reversal	
A. The Facts of t w Identical to S	14
B. Section 6 (j) stant Case Are Virtually Conscientious r and Welsh Service Facin Be Interpreted to Cover	14
C. The Court B jection to the Military Gillette's Con e Registrant ticipating in t Improperly Construed a Political V itious Opposition to Par- War in Vietnam as Solely	22
	34

PAGE

II. It is unconstitutionally discriminatory, in violation of the First and Fifth Amendments, for a statute to authorize conscientious objector status for total objectors, but to deny such status to Petitioner. Moreover, the establishment and free exercise of religion clauses of the First Amendment should be held to require recognition of Petitioner's claim 38

A. Unconstitutional Discrimination Against Religious Beliefs and Establishment of Religion 38

B. Significance of McFadden, Bowen and Sisson Decisions 45

III. The right to conscientious objector status must be considered of constitutional dimension and must be given the broadest possible protection by this Court 56

A. Historical Evidence 57

B. Constitutional Interpretation 69

IV. No other competing Government interest can justify denial of conscientious objector status to individuals in Petitioner's position 74

A. Administrative Convenience 74

B. Maintenance of Morale and Efficiency in the Armed Services 77

C. Disrespect for Law 79

PAGE

(1) All killing under any circumstances 81

(2) Political question 82

(3) Disrespect for law 83

CONCLUSION 85

TABLE OF AUTHORITIES

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Abington School District v. Schempp, 374 U.S. 203 (1963) 11, 40, 70, 71

Bolling v. Sharpe, 347 U.S. 497 (1954) 41
Bouziden v. United States, 251 F.2d 728 (10th Cir. 1958) 27
Braunfeld v. Brown, 366 U.S. 599 (1961) 39

Cantwell v. Connecticut, 310 U.S. 296 (1940) 74

Epperson v. Arkansas, 393 U.S. 97 (1968) 40, 41, 55
Everson v. Board of Education, 330 U.S. 1 (1947) 40, 55

Fleming v. United States, 344 F.2d 912 (10th Cir. 1965) 26
Follet v. Town of McCormick, 321 U.S. 573 (1944) 41
Fowler v. Rhode Island, 345 U.S. 67 (1953) 41

Girouard v. United States, 328 U.S. 61 (1946) 69, 70
Goodwin v. Laird, —— F. Supp. ——, 3 SSLR 3151 (N.D. Calif. June 19, 1970) 20

Hamilton v. Regents, 293 U.S. 245 (1934) 69

PAGE

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Jessen v. United States, 212 F.2d 897 (10th Cir. 1954) .. 27

Kretchet v. United States, 284 F.2d 561 (9th Cir. 1960) 10, 28

Lovell v. Griffin, 303 U.S. 444 (1938) 74

Mayfield v. United States, 220 F.2d 729 (5th Cir. 1955) 27
Miller v. Laird, —— F. Supp. ——, 3 SSLR 3146 (N.D. Calif. April 28, 1970) 10, 25

NAACP v. Button, 371 U.S. 415 (1962) 74

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 54, 55

Reynolds v. United States, 98 U.S. 145 (1878) 54, 55

Schneider v. State, 308 U.S. 147 (1939) 74
Seeger v. United States, 326 F.2d 846 (2d Cir. 1964) 15, 17, 44
Selective Draft Law Cases, 245 U.S. 366 (1918) 68
Shepherd v. United States, 217 F.2d 942 (9th Cir. 1954) 27
Sherbert v. Verner, 374 U.S. 398 (1963) 11, 13, 39, 50, 54, 71, 75
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PAGE

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United States v. Close, 215 F.2d 439 (7th Cir. 1954) 27
United States v. Davila, 3 SSLR 3089 (5th Cir. July 1, 1970) 27
United States v. Hartman, 209 F.2d 366 (2d Cir. 1954) 27
United States v. Haughton, 413 F.2d 736 (9th Cir. 1969) 20, 25, 26, 38
United States v. James, 417 F.2d 826 (4th Cir. 1969) 20
United States v. Kauten, 133 F.2d 703 (2d Cir. 1943) 29, 30
United States v. Macintosh, 283 U.S. 605 (1931) 69, 71
United States v. McFadden, 309 F. Supp. 502 (N.D. Calif. 1970) 12, 41, 44, 45, 47, 53, 54, 75
United States v. Owen, 415 F.2d 383 (8th Cir. 1969) 10, 20, 24, 31, 38
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PAGE

United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1968, appeal dismissed, 399 U.S. —— (1970) 12, 35, 41, 45, 47, 48, 49, 53, 74, 75
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Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968) 15
Welsh v. United States, 398 U.S. 333 (1970) 9, 10, 13, 14, 15, 16, 17, 21, 22, 23, 24, 30, 31, 37, 38, 42, 43, 56, 82
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 70

Zorach v. Clauson, 343 U.S. 306 (1952) 71

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PAGE

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3 Elliot's *Debates* 657 (2d ed. 136) 61
4 Elliott's *Debates* 243 (2d ed. 1836) 61

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PAGE

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PAGE

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United States Constitution
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Second Amendment 12, 62
Fifth Amendment 23, 38, 41

Federal Statutes:

28 U.S.C. §1254(1) 1
Military Selective Service Act of 1967
Section 6(j), 50 U.S.C. App., §456(j) 2, 9, 11, 20, 22, 23, 24, 38, 46
Militia Act of 1792 (Act of May 8, 1792, ch. 33, 1 Stat. 271) 68

PAGE

Section 5 of the National Service Act of 1939 (2 & 3 Geo. 6, c. 81) 75

Foreign Statute:

Australian National Service Act Section 29A(1) 31

Regulations:

32 C.F.R. 1624.1 6

State Constitutions and Statutes:

Article VIII of the Declaration of Rights to the Pennsylvania Constitution 59
Article X of the Massachusetts Declaration of Rights (1780) 60
Article XII and XIII of the New Hampshire Bill of Rights of 1783 60
Article XL of the 1777 New York Constitution 60
Section 9 of the 1777 Vermont Constitution 60
Section 10 of the 1776 Declaration of Rights (Laws of the State of Delaware, 1700-1797, vol. I, Appendix (1797) 60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision of the court of appeals (A. 19-22) is reported at 420 F.2d 298 (2d Cir. 1970). The judgment of the district court is unreported (A. 18).

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1970. The petition for certiorari was filed on February 11, 1970 and certiorari granted on June 29, 1970. This court has jurisdiction under 28 U.S.C. sect. 1254 (1).

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sect. 6 (j), 50 U.S.C. App., Sect. 456 (j):

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

Questions Presented

1. Can a non-religious objector claim a 1-O classification?
2. Can an objector who frames his opposition to war in terms of the Vietnam war, the war he is then faced with, qualify as a conscientious objector?

Statement of the Case

Petitioner was convicted of refusal to report for induction into the Armed Forces in violation of the Military Selective Service Act of 1967 and sentenced to a term of two years imprisonment. He had originally registered with Local Board No. 8 of Yonkers, New York on March 4, 1964. He worked as a photographer's assistant for one year and then became a full time student at the Neighborhood Playhouse School of the Theater (located in New York City) in September, 1965, studying to be an actor. He continued at the school for its full two year program.

In April, 1967, Petitioner requested a SSS Form 150 to apply for conscientious objector status. He said in his covering letter:

> "I am requesting the classification of conscientious objector on the basis of the following reasons:
>
> 1) I believe that the United States government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice. . . .
>
> 2) I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism". This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition.
>
> Religion of Humanity: 'holding that mans duty is chiefly or wholly comprised in the advancement of the human race.'—The Oxford Universal Dictionary.
>
> I would like to request that you send me a Form 150" (A. 23-24).

In his SSS Form 150 Petitioner claimed he could neither affirm nor deny a belief in a Supreme Being. When asked to describe the nature of his belief, on which he based his C.O. claim, he stated:

> "Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings, is not dependant upon being a member of a specific Religious Sect or organization.
>
> "The following quote from John Haynes Holmes expresses my feelings very well:

> 'Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . it is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best' " (A. 27, 29).

In response to question 5 of the form ("Under what circumstances, if any, do you believe in the use of force?") he answered:

> "For the personal protection of self and other individual persons.
>
> To enforce a decision, by a majority of the United Nations, against a country accused of breaking the peace, or the direct defense of my country. See statement originally sent Local Board 8" (A. 26).

Petitioner submitted six letters with his application (See A. 33-42): One, from the Episcopal priest who has baptized him, stated:

> "I am amazed at young Guy's thought on the subject of Pacificism as expressed in his answers to salient questions. It shows real concern for Christian neighbors, a great deal of hard study and soul-searching. It is true it might be based on a deeper and more historical religious conviction; but the Humanist position is succinctly put" (A. 40).

Another letter was sent by a Congregational minister who had known Petitioner from earliest childhood:

> "I have known Guy Gillette from his earliest childhood. In all my contacts and conversations with him, I have always found him to be serious-minded and utterly honest. More than what is usual in youth, he has been

inclined to be very sensitive to the deeper meanings of life and in his regard for them. Often, even as a child, I found him asking the profounder question which more adult minds missed or lightly dismissed.

As to his present claim to being a conscientious objector, I believe it to be primarily related to the war efforts in which our country is now engaged. I have spoken with him frequently over the past few years concerning them and I cannot agree with his evaluation of our commitment and obligation as a nation. I do not, however, question the sincerity with which he holds his position, nor with his conviction that to support them by bearing arms would both be a basic personal betrayal of what he believes and detrimental to the nation's welfare. This has been a burdensome and agonizing matter with him which he has sought to resolve objectively and, at whatever cost to himself, he feels he must maintain responsibly and with a sense of duty. I only regret that his orientation has been such that he cannot see it differently.

His objection on the basis of religious conviction, I believe to be secondary but of longer standing and of more significance" (A. 33-34).

Petitioner's Godfather, Archie Smith, wrote to the draft board:

"As a child he was always serious, honest and straightforward. In his formative years he has proved himself to be a young man of strong principles and integrity and of a moral character beyond reproach. His present stand is not that of the coward or the draft dodger. On the contrary it is an act of extreme courage. It is not easy to take a stand that exposes him to the easy accusation of being unpatriotic, even when his stand is born of a deep love for America and a desire for a higher morality in her relations with other nations" (A. 35).

On June 21, 1967 the Local Board denied Petitioner's 1-O application and classified him 1-A. He filed a notice of appeal with the State Director who requested that the local board arrange for a personal appearance in accordance with 32 C.F.R. 1624.1. Petitioner appeared on August 8, 1967 to explain his position to the board. He later testified concerning his appearance:

> "Well, approximately they asked me if I was opposed to all war and I said yes, that I was. Then they said, but are you specifically opposed to the war in Vietnam. I said I am, yes, because that's the war I am faced with. That's the only war that I have to contend with at the time. I don't have to worry about any other war so I said yes, I am opposed to the war in Vietnam. And then I believe they asked me 'Would you serve as a non-combatant in the United States Army?' And I told them that I wouldn't because I felt that was aiding the war effort, which I was opposed to.
>
> Then they asked me 'Would you accept civilian duty in a hospital, or that type of civilian duty,' and I said yes, that I would.
>
> Then they were talking about my religious beliefs. They said, 'You know, is your religion, are you basing this on your religion,' and I explained that my religion was a humanist—it was based on a humanist approach to religion, that it wasn't a more or less recognized religion, and I said that I believed that man is totally responsible to himself for what he does, and that the responsibility is up to me to make a decision as to whether I will kill another man."
>
> • • • • •
>
> "I told them what I just said about the Nuremberg charter, and as I recall, there was no statement at all either way to any of these things except, you know, yes

and no, and they were just agreeing. And I believe that that was about all that transpired between us and they said okay."

• • • • •

"Q. Now, Mr. Gillette, did any member of the board give an opinion as to what he thought about your grounds at that time? A. There was no opinion at all except—the only opinion actually that I remember them giving at all was when I said that I would not serve as a non-combatant in the Army one of the members sort of gave a sarcastic laugh and said, 'I thought so' and that was all. There was no reason given, there was nothing given. They just well, well, thank you very much. And that was it" (Tr. 26-29) (A. 7-9).

The Local Board summarized Petitioner's appearance in the following words:

"Registrant stated his conscience would not let him fight in Vietnam.

Registrant also stated he could not honestly say he would not defend his country if it were attacked. He very well might fight in respect to the country being attacked.

His main source of information which brought about these beliefs was from the news media in respect to publications on the war.

Registrant is opposed to military service in the case of the *Vietnam* War.

Registrant formed his beliefs in the past 2 years or so and is more or less a result of the Vietnam war" (A. 44).

The board refused to reopen the classification and retained Petitioner in a 1-A status.

Petitioner filed a timely appeal with the State appeal board which declined to overrule the local board's determination.

Petitioner appeared for a physical examination on November 14, 1967 and was ordered to report for induction on December 14, 1967. He failed to report on the day designated and on December 27, 1967 he sent the following letter to the board:

> "Dear Sirs,
>
> In answer to your letter of December 22, I did not appear for induction as scheduled because of reasons stated in my application as a Conscientious Objector. These reasons are, that on the basis of individual conscience (as set forth in the Nuremberg Charter), I cannot serve in support of war. In particular the war in Vietnam, which I feel is unjust and illegal. Fundamental questions of life: the infliction of pain, suffering or death on other people, is to me, against all principles of my Humanist belief. I believe that the development of ethical values should be a persons supreme aim in life. This belief is basic in the lives of many individuals and of The Society for Ethical Culture.
>
> Each individual faces a personal dilemma many times in his life, but surely if ones life is a whole and is not compartmentalized, he must live by the same values which support and answer these fundamental questions: by what right may I take anothers life, or destroy his family and home? The only moral or religious reality for me, is to answer that I cannot" (A. 32).

Petitioner was indicted on February 3, 1969 for failing to report for induction. He was tried by a jury before

Judge Inzer B. Wyatt of the Southern District of New York, found guilty and sentenced to two years imprisonment. The conviction was affirmed by the court of appeals on January 9, 1970.

Summary of Argument

I.

Petitioner in the instant case is a humanist objector to war who is indistinguishable in many ways from Daniel Andrew Seeger (*United States* v. *Seeger*, 380 U.S. 163 (1965)), and Elliott Ashton Welsh (*Welsh* v. *United States*, 398 U.S. 333 (1970)). All three came from non-pacifist backgrounds, were sincere and ethical objectors to war and thought thoroughly about the relation of politics to their ethical ideas. The only difference between Gillette, Seeger and Welsh is that Gillette framed his conscientious objection to war in terms of the Vietnam War, the specific war he was then being drafted into. However, neither the thrust of the *Seeger* or *Welsh* cases, nor the words of Section 6 (j) of the Military Selective Service Act, nor the requirements of the Constitution can allow Gillette's conscientious objector claim to be denied while those of Seeger and Welsh were granted.

In the *Seeger* case this Court broadly construed the term "Supreme Being" then found in Section 6 (j) and in *Welsh* it gave a broad reading to "religious training and belief" in order to avoid serious constitutional doubts concerning that section of the law. Similar constitutional problems require a broad reading of "participation in war in any form" so that Section 6 (j) would cover individuals like Gillette who

conscientiously object to the war they are then being faced with. Some federal courts have already taken the position that a person who claims he would fight if the United States were invaded can nevertheless be entitled to conscientious objector status. See *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969); *Miller* v. *Laird*, 3 SSLR 3146 (N.D. Calif. April 28, 1970). Many other federal courts have permitted Jehovah's Witnesses to be conscientious objectors despite the fact that they would fight in a theocratic war ordained by God. See *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960); *Taffs* v. *United States*, 208 F.2d 329 (8th Cir. 1953). In the *Taffs* case the court construed the phrase "in any form" to modify the word "participation" rather than the word "war," a reading which would clearly permit conscientious objection status to individuals like Petitioner who object to any form of participation in the Vietnam War.

Since individuals like Gillette are not being faced with an invasion of the United States or a United Nations sanctioned war or World War II, the fact that their consciences would allow them to fight in these wars should not be sufficient to deny them conscientious objector status with respect to the war they are being faced with, namely the Vietnam War. It is the present war that Section 6 (j) is concerned with, not the past or the unknown future. Therefore, sincere and conscientious scruples against participating in the immediate war a registrant is then confronting should justify conscientious objector status.

Nor is such sincere opposition to the Vietnam War only a political decision. This Court made clear in *Welsh*

that political considerations may be a valid component of conscientious objection to participation in war. Merely because political considerations play a role in the ethical evaluation that leads to conscientious opposition to war or a particular war, that does not mean that the required moral or religious compulsions justifying 1-O status are not present.

II.

To construe Section 6 (j) as covering only the traditional pacifists who object to all wars would be a violation of the Establishment Clause of the First Amendment. This Court's decisions in *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Torasco* v. *Watkins,* 367 U.S. 488 (1961), and *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) make clear that the government cannot pass any laws which aid any particular religion or all religions against non-believers. Once Congress has recognized that one particular religious sect is entitled to conscientious objector status all other individuals similarly inspired must be similarly treated.

Furthermore, the Free Exercise Clause of the First Amendment requires that individuals like Gillette be given conscientious objector status. There is no question that many religions follow the "Just War" doctrine which requires an individual to make an ethical evaluation of the particular war he is being required to participate in. The same ethical considerations apply when just war adherents or humanist objectors such as Gillette make their moral decisions about a particular war as when a Quaker decides he cannot fight in any war. All these individuals must be allowed to exercise their religion freely. Restrictions have

been imposed on the free exercise of religion only when affirmative acts required by the religion had been thought to affect adversely society's health or morals. No such problem is presented here. Individuals such as Gillette are asking only that they should not be required to kill.

Three recent district court decisions, *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970); *United States* v. *Bowen*, 2 SSLR 3421 (N.D. Calif. Dec. 24, 1969); *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968) have analyzed the problem in the manner noted above and have granted conscientious objector status to individuals such as Gillette who expressed conscientious scruples concerning the particular war they were faced with.

III.

Historical evidence and recent constitutional development make clear that conscientious objector status is of constitutional dimension and should be given the broadest possible protection by this Court.

Conscientious objector protection was afforded to members of the peace sects from the earliest Colonial times. Furthermore, many states included such protection in their constitutions framed during the Revolutionary War era, indicating the importance of this right. Four states recommended amendments to the federal Constitution specifically to protect conscientious objectors. When James Madison introduced the Bill of Rights into the First Congress he included a conscientious objector clause in the provision that became the Second Amendment. The reason such a clause was not adopted was to protect the rights of conscientious objectors rather than restrict them. Most states

already had generous provision for such objectors and it was felt a uniform federal rule would hurt rather than help such objectors.

This Court's recent interpretation of the Establishment and Free Exercise Clauses shows that Congress could not deny conscientious objector status to Quakers or other members of the peace churches. Such a denial would impose an unnecessary burden on religion not justified by an overriding government interest. But once the right is recognized for Quakers or Jehovah's Witnesses the Establishment Clause requires that all other citizens similarly inspired must be similarly treated.

IV.

No other competing government interest can justify denial of conscientious objector status to individuals in Petitioner's position. There is no danger of a multiplicity of claims arising. Although the *Seeger* and *Welsh* cases were supposed to open the flood gates for conscientious objector claims, the number of individuals in 1-O or 1-W status has remained extremely low. This Court's decision in *Sherbert* also indicates that the purported danger of false claims is not a sufficient basis for restricting the recognition of conscientious objection.

The morale and efficiency of the armed forces would be increased by the grant of conscientious objector status to individuals like Gillette since the presence of sincere objectors in the army creates severe discipline and morale problems.

Nor would the grant of 1-O status to so-called selective objectors lead to a disrespect for law in our society. The

conscientious objector right has been a very particular relief from the requirements of law and a specific alternative burden has generally been imposed on those requesting that status. Furthermore, there is a distinction between restraining a citizen from doing an act which he feels is required by his religion and compelling him to do affirmative acts which he regards as unconscientious and immoral.

ARGUMENT

I.

Welsh v. *United States*, 398 U.S. 333 and *United States* v. *Seeger*, 380 U.S. 163 require reversal of the conviction below.

A. *The Facts of the Instant Case Are Virtually Identical to* Seeger *and* Welsh

Petitioner Guy Porter Gillette stands in the same posture as Daniel Andrew Seeger (*United States* v. *Seeger*, 380 U.S. 163 (1965)) and Elliott Ashton Welsh (*Welsh* v. *United States*, 398 U.S. 333 (1970)). All three young men did not belong to a historic peace church, nor did they formally attend any church in their young manhood. When they registered for the draft none had come to accept pacifist principles and none applied for conscientious objector status. Petitioner Gillette, like Seeger, held a 2-S deferment for the period of time he was in school and like Seeger applied for 1-O status only as the 2-S deferment was drawing to an end. (Welsh had been permitted to travel abroad for a year by his draft board and immediately on his return applied for conscientious objector status.) All three men filled out the SSS Form 150, claim-

ing that their consciences would not permit them to participate in the war.

Seeger described his belief as rooted in a devotion "to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." 380 U.S. at 166. He wrote further: "It is our moral responsibility to search for a way to maintain the recognition of the dignity and worth of the individual, the faith in reason, freedom, and individuality, and the opportunity to improve life for which democracy stands." *United States* v. *Seeger*, 326 F.2d 846, 848 (2d Cir. 1964). Welsh wrote in his original application:

> "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant." 398 U.S. at 343.

He later wrote in a letter to his appeal board: "I believe both ethical and religious values usually arise from the same source: the individual's concern for other individuals." *Welsh* v. *United States*, 404 F.2d 1078, 1091 (9th Cir. 1968).

Similarly, Petitioner wrote in his SSS Form 150:

> "Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings, is not dependent upon being a

> member of a specific Religious Sect or organization" (A. 27).

In his final letter to his draft board, he wrote:

> . . . on the basis of individual conscience (as set forth in the Nuremberg Charter), I cannot serve in support of war. In particular, the war in Vietnam, which I feel is unjust and illegal. Fundamental questions of life the infliction of pain, suffering or death on other people is to me, against all principles of my Humanist faith . . . by what right may I take anothers life, or destroy his family and home? The only moral or religious reality for me, is to answer that I cannot (A. 32).

Petitioner like Welsh was troubled and concerned by problems of world politics which played a role in developing his conscientious objection to war. Thus Welsh wrote to his draft board:

> "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we *as a nation*, fail our responsibility *as a nation*." 398 U.S. at 342.

Seeger had similarly written to his local board.

> "My decision arises from what I believe to be considerations of validity from the standpoint of the welfare of humanity and the preservation of the democratic values which we in the United States are struggling to maintain. I have concluded that war, from the practical standpoint, is futile and self-defeating, and that from

the more important moral standpoint, it is unethical." 326 F.2d at 848.

In the same vein, Petitioner in his initial letter to his board expressed similar ideas:

"I am requesting the classification of conscientious objector on the basis of the following reasons:

1) I believe that the United States government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice. . . .

2) I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism". This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capacity to improve some of the pains of the human condition.

Religion of Humanity: "holding that mans duty is chiefly or wholly comprised in the advancement of the human race."—The Oxford Universal Dictionary.

I would like to request that you send me a Form 150" (A. 23-24).

The sincerity of the beliefs of the three young men is also clear. The sincerity of both Seeger and Welsh was found by Hearing Officers of the Department of Justice under the procedures for processing conscientious objector claims then in force. (See 380 U.S. at 167 and 398 U.S. at 337).

Petitioner's sincerity was testified to by six letters submitted on his behalf when he filed his C.O. claim. (See A. 33-42). One family friend wrote:

"I have seen Guy, Jr., grow from adolescence to young manhood. He has always impressed me, even as a youth, as someone with strong, heartfelt convictions and I have no doubt of his sincerity as a conscientious objector.

It is possible that I in no small measure contributed, unwittingly, to his feelings. I served in the Second World War in the U.S. Army Air Force. Guy and his younger brother were a fascinated audience for my stories about my war experiences—which were far from pleasant and included almost two years of imprisonment by the Germans, as well as being bombed by U.S. planes. Looking back, now, I realize how graphic I was about the horrors and, in many ways, the futility of war (A. 41).

Another friend wrote:

"I have known Guy Gillette, Jr. and his family for 10 years. In that time I have seen Guy mature; he is a thinking, feeling young man who reflects the kind of home in which he grew up. The influence of his parents is obvious. They have inculcated an awareness—and concern—for the world around him. I consider him to be a compassionate human being, sensitive to the rights of others, involved with his fellow man" (A. 38).

A third said:

"I have been acquainted with Guy for a number of years on a social level, being friends of the family; and also on a business basis with his father. Therefore I feel qualified to give an appraisal of his honesty; and I firmly believe in his sincerity with respect to the crucial question of participation in this war" (A. 37).

Two ministers also wrote in support of his claims. One noted:

> "I have known this youth all of his life—I Baptised in infancy. I have known his parents for a little longer and I find this family sincere and loyal in all their dealings.
>
> I am amazed at young Guy's thought on the subject of Pacificism as expressed in his answers to salient questions. It shows real concern for Christian neighbors, a great deal of hard study and soul-searching. It is true it might be based on a deeper and more historical religious conviction; but the Humanist position is succinctly put" (A. 40).

The other minister, a former military chaplain, wrote even more strongly:

> "His objection on the basis of religious conviction, I believe to be secondary but of longer standing and of more significance. And again, I would disagree with the conclusions to which he, in good conscience and to the best of his ability, has come. Yet in my twenty years as a chaplain in the military service, and consultations on the subject of conscientious objection, I have seldom encountered a more earnest and selflessly honest soul-searching appraisal. It is devoid of any thought of evasion of duty, expediency or personal consideration. Nor does it involve pacifism as a social or political technique, or the authority of an organized religious body. Rather, it is based on a fundamental regard for human life as sacred which he feels conscience-bound to uphold. The basic evil of war to impersonalize and destroy this ultimate evaluation of human life, I feel, is the motivating source for his conscientious objection" (A. 34).

The local board in denying Petitioner's claim for C.O. status never questioned his sincerity.[1] The summary of

his appearance before the board made clear that they focused only on his objection to the Vietnam War. Judge Wyatt also specifically found that *"aside from any question of sincerity,* the views of the defendant were primarily, if not entirely, based on an opinion, a feeling, a belief, that the Vietnam war is immoral and unjust" (Tr. 42) (A. 12). There is no evidence or any suggestion at any stage of the Selective Service proceedings that Petitioner did not sincerely hold to the beliefs he was expressing in his conscientious objector claim.[2]

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[1] The initial determination by the board was made on June 21, 1967, under Section 6 (j) of the Universal Military Training and Service Act of 1951; Petitioner's personal appearance took place on August 8, 1967 after Section 6 (j) had been amended by the Military Selective Service Act of 1967 to eliminate the "Supreme Being" language. It is clear that the change in language had no substantial effect upon the test to be applied. Senator Richard Russell, chairman of the Senate Armed Services Committee and a member of the Senate-House conference committee stated:

> "In my opinion, the conference report goes in the direction of confirming the decision of the Supreme Court [in *Seeger*] ... I think that a change in [the *Seeger*] decision was an objective of the House. However, we did not accept that provision as it came from the House.
>
> "I merely wish to have the Record show for the legislative history that the Senate conferees are not of the opinion that the new definition overrules [*Seeger*]." 113 *Cong. Rec.* S 8054 (daily ed. June 12, 1967).

[2] "Some affirmative evidence indicating insincerity or bad faith must be shown in order to rebut [a] claim [of conscientious objection]". *United States* v. *Owen,* 415 F.2d 383, 389 (8th Cir. 1969). In order to sustain a denial on the grounds of insincerity there must be a definite finding of disbelief of the registrant. *United States* v. *James,* 417 F.2d 826 (4th Cir. 1969); *Goodwin* v. *Laird,* —— F. Supp. ——, 3 SSLR 3151 (N.D. Calif. June 19, 1970); specific reasons justifying a conclusion of insincerity must be offered by the local board, *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *United States* v. *Haughton,* 413 F.2d 736 (9th Cir. 1969); *United States* v. *St. Clair,* 293 F. Supp. 337, 341 (E.D.N.Y. 1968).

To summarize, Seeger, Welsh and Gillette came out of non-pacifist backgrounds, none applied for C.O. status at the time of registration, they were all ethical objectors to participation in war; the traditional anthropomorphic God had no place in their thought; political ideas formed an important basis for their conscientious scruples about war; and they held their beliefs sincerely.

The only difference between the three cases is that Gillette framed his responses and marshalled his arguments with respect to the specific war he was then facing, that is, the Vietnam War. (When Seeger applied for C.O. status in 1957 and Welsh did the same in April, 1964, they were not faced with the concrete problem of a specific war.) But there is no doubt that Gillette's humanistic beliefs "occupie[d] in [his] life . . . a place parallel to that filled by the God of those ultimately qualifying for the exemption . . . " just as with Seeger, 380 U.S. at 176. These beliefs were "in his own scheme of things, religious," *id.* at 185, that is, they played the role of a religion and functioned as a religion in his life, even to the point of his risking jail to follow them. Furthermore, as in *Welsh,* Gillette's opposition to war stemmed from his moral, ethical and religious beliefs about what is right and wrong. Even though they were "purely ethical and moral in source and content" they imposed "upon him a duty of conscience to refrain from participating" in the war he was then faced with. 398 U.S. at 340.

But Gillette's conscientious objection to the Vietnam War is not a sufficient basis for distinguishing *Welsh* and *Seeger.* As Petitioner testified, he had initially expressed to the local board a conscientious objection to all war. When pressed about the war in Vietnam, he readily agreed

that he was opposed to that war "because that's the war I am faced with" (Tr. 26) (A. 7). Although he answered hypothetical questions about a supposed invasion of the United States or a war sanctioned by the United Nations, he was not faced with those alternatives. He opposed what he was asked to do—to accept induction into a military force fighting a specific war—on the basis of humanistic, conscientious, "religious" beliefs, deeply rooted in his background. There can be no question that his conscience "spurred by deeply held moral, ethical or religious beliefs, would give [him] no rest or peace if [he] allowed [himself] to become a part of an instrument of war." *Welsh, supra,* 398 U.S. at 344. For the reasons noted below, this cannot be a sufficient basis for distinguishing *Welsh* or *Seeger* either as a matter of statutory construction or constitutional interpretation.

B. *Section 6 (j) Must Be Interpreted to Cover Conscientious Objection to the Military Service Facing the Registrant*

Petitioner urges that the words "conscientiously opposed to participation in war in any form" in Section 6 (j) must be construed to cover individuals such as himself who are conscientiously opposed to the war they are then being drafted into, but whose consciences would allow them to fight in other wars, such as one to repel an invasion or one sanctioned by the United Nations.

This Court in *Seeger* specifically interpreted the term "Supreme Being" in 6 (j) to mean more than the orthodox God. It included "a broader concept of a power or being . . . 'to which all else is subordinate' . . . " 380 U.S. at 174. In a concurring opinion, Justice Douglas pointed out that

such an interpretation was probably necessary "to save [the law] from demise on constitutional grounds" and to avoid "a serious constitutional doubt" under the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. 380 U.S. at 188. Similarly Justice Harlan in *Welsh* characterized the plurality opinion of Justice Black as an attempt to "[read] out of [the law] any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophic views or a merely personal moral code.'" 398 U.S. at 351. Justice Harlan construed the law to grant conscientious objector status only to those adhering to theistic religious beliefs. However such an interpretation, he concluded, runs afoul of the Establishment Clause and is "that kind of classification that this Court had condemned." 398 U.S. at 357-58.

In the instant case the same problem is presented. To construe Section 6 (j) in such a way as would cover Welsh, Seeger and traditional pacifists but to exclude Gillette, whose beliefs may be as sincere and deeply held as the most religious of Quakers, offends not only the Free Exercise and Establishment Clauses but the Due Process Clause as well. (See Point II below). The terms "conscientiously opposed to participation in war in any form" found in Section 6 (j) must therefore be interpreted to include all those sincerely opposed to the compulsory military service they are then facing.

Moreover, the same reasons that led this Court in *Seeger* to construe broadly the term "Supreme Being" and in *Welsh* to construe broadly "religious training and belief" should lead to a broad reading of "participation in war in any form." This Court recognized that the inner compul-

sions that forbid men to enter the armed services are not found only in Quakers or Jehovah's Witnesses. This Court's decisions in *Seeger* and *Welsh* are based on an awareness of an evolving moral sense that inspires certain men from all ethical backgrounds to avoid lending their bodies to the uses of war.

The interpretation of Section 6 (j) urged by Petitioner has been accepted by a number of federal courts. In *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969) the defendant was asked, just as Gillette was asked, "If your country were invaded, would you change your mind?" Owen allegedly stated, "Yes, it is possible that I would." Although there was some dispute as to whether Owen made the comment or not, the Court said, "Even if we take the transcript prepared by the board clerk as a true reflection of Owen's reply, it does not supply a basis in fact for the appeal board's classification, *as it clearly relates to a contingency* and provides no inference as to Owen's state of mind when the incident occurred" (emphasis added).

In the same way, Gillette's willingness to fight in other wars "relates to a contingency and provides no inference as to [his] state of mind" when he applied for conscientious objector status. As he explained later,

> "they asked me if I was opposed to all war and I said yes, that I was. Then they said, but are you specifically opposed to the war in Vietnam. I said I am, yes, because that's the war I am faced with. That's the only war that I have to contend with at the time. I don't have to worry about any other war so I said yes, I am opposed to the war in Vietnam" (Tr. 26) (A. 7).

In a more recent case in the Northern District of California, *Miller* v. *Laird,* —— F. Supp. ——, 3 SSLR 3146 (N.D. Calif. April 28, 1970) an Army Reservist sought discharge as a conscientious objector. An army hearing officer claimed that the petitioner had expressed a willingness to fight to repel invaders and therefore he rejected petitioner's application. The court held:

> "the court does note that one of the primary allegations of the hearing officer, even if true, is no ground for denying petitioner's claim. The hearing officer states that petitioner said he would fight to repel invaders. The question of whether one can be a conscientious objector and be committed to fighting an invasion has been dealt with in other cases. In *United States* v. *Owen,* 415 F.2d 383, 390 (8th Cir. 1969), the defendant stated that it was possible that he would fight if his country was invaded. The court held that this established no basis in fact as it 'clearly relates to a contingency and provides no inference as to Owen's state of mind when the incident occurred....'
>
> The Ninth Circuit in *United States* v. *Haughton,* 413 F.2d 736, 742 (9th Cir. 1969), states that a man was a conscientious objector even though he believed in the use of force 'to protect the community.' See also *United States* v. *Purvis,* 403 F.2d 555, 563 (2d Cir. 1968)."[3] 3 SSLR at 3148.

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[3] In *United States* v. *Haughton,* 413 F.2d 736 (9th Cir. 1969) the registrant claimed that he believed in the use of force by the police "to protect its citizens from themselves . . . a police force is limited to protecting the community from a few individuals." He also agreed that it was "morally justifiable to shoot a person who was about to kill a friend of mine." More generally force or violence was justifiable if it is "the sole method of stopping said individual or group from committing an act that to me is morally worse than said act of force." 413 F.2d at 740-41. The government again argued that this position was inconsistent with an

This position is also confirmed by a series of cases involving Jehovah's Witnesses in some of which courts have construed the phrase "in any form" to modify the word "participation" rather than the word "war." If this construction is sustained, then Petitioner's conviction must be reversed, for the record clearly demonstrates his conscientious objection to any form of participation in the Vietnam War. The logical necessity for such a construction was noted in *Taffs* v. *United States,* 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954), which dealt

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objection to participating in war. But the Court rejected that contention.

> Haughton's willingness to use force to protect the community or to stop another from taking a life is consistent with conscientious objector status. 413 F.2d at 742.

In *United States* v. *Purvis,* 403 F.2d 555 (2d Cir. 1968) the registrant answered question II (5) of SSS Form 150 ("Under what circumstances, if any, do you believe the use of force") in the following way:

"I believe in the use of force only if it is used as the only alternative to restrain an individual from doing wrong, but not used to indiscriminately kill." 403 F.2d at 563. The government argued that the answer showed a lack of objection to participation in war. But the court rejected that interpretation:

> Agreement that force can be used to restrain wrongdoing, especially as the last alternative, has little bearing on an attitude toward war. We would not expect a full-fledged conscientious objector to stand by while a madman sprayed Times Square with machine gun bullets, or while an assassin took aim at the President. 403 F.2d at 563.

In addition, the decision in *Fleming* v. *United States,* 344 F.2d 912 (10th Cir. 1965), seems to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminate war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F.2d at 914. Expressly adverting to defense of country, the defendant in *Fleming* stated that "self-defense of a people would not involve war but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

with the treatment to be accorded to a Jehovah's Witness who conceded that he would fight in a war ordained by Jehovah. The court there said:

> ". . . [W]e are inclined to think that Congress did not intend such an unreasonable construction to be placed on this phrase. . . . The words, 'in any form,' obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms." 208 F.2d at 331.

The *Taffs* case, *supra,* is only one of a very long line of cases dealing with the proper treatment to be accorded to Jehovah's Witnesses, and to the various views on participation in war which are held by the members of that faith. All of these cases have upheld the right of Witnesses to the status of conscientious objector, notwithstanding their frequent concessions that they would, indeed, gladly take part in a war which they believed to be ordained by their God.[4]

This Court too, has supported the right to conscientious objector status of a Jehovah's Witness who conceded that he would participate "in defense of his ministry, Kingdom interests, and in defense of his fellow brethren."

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[4] See e.g., *United States* v. *Hartman*, 209 F.2d 366, 370-371 (2d Cir. 1954), which employs language almost identical to that quoted from *Taffs, supra; United States* v. *Pekarski*, 207 F.2d 930 (2d Cir. 1953); *Bouziden* v. *United States*, 251 F.2d 728 (10th Cir. 1958); *Jessen* v. *United States*, 212 F.2d 897, 899 (10th Cir. 1954); *Shepherd* v. *United States*, 217 F.2d 942 (9th Cir. 1954); *United States* v. *Close*, 215 F.2d 439, 442 (7th Cir. 1954); *United States* v. *Wilson*, 215 F.2d 443, 446 (7th Cir. 1954); *Mayfield* v. *United States*, 220 F.2d 729 (5th Cir., 1955); *United States* v. *Davila*, 3 SSLR 3089 (5th Cir. July 1, 1970); *United States* v. *Bey*, 3 SSLR 3097 (N.D. Ill. April 29, 1970).

Sicurella v. *United States*, 348 U.S. 385, 388 (1955). Sicurella's right to the exemption was upheld, even in the light of the fact, made clear by the dissenting opinions, that the type of war in which he would participate was not some remote, otherworldly conflict, but any war "... approved by Jehovah, such as the blood and flesh wars of the Israelites." Mr. Justice Reed, dissenting, 348 U.S. at 392-393. A second dissenter in *Sicurella* observed, even more pointedly, that:

> "Petitioner says he is opposed to fighting a secular war but is not opposed to fighting a religious war where the interests of his sect are involved. . . .
>
> ". . . [H]e reserves the right to choose the wars in which he will fight." Mr. Justice Minton, dissenting, 348 U.S. at 394-395.

More recently, in *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960), *Sicurella* was relied on by the Court to support the claim of a Jehovah's Witness whose willingness to fight in earthly wars was even more manifest than that of Sicurella. Kretchet, in the second of his two personal appearances before his local board, ". . . stated that he never claimed to be against war in any form, [and] that he believed in theocratic warfare commanded by God. . . ." 284 F.2d at 564. In addition, the Court noted, at his personal appearance before a Justice Department hearing officer, on the second of his two appeals, Kretchet stated clearly ". . . that if Jehovah, or someone believed to be speaking for Jehovah, ordered him to slay now or to participate in war now, he would participate in such a war and that in such participation he would use such carnal weapons as were available to him in order to carry out Jehovah's commandments." *Id.*

There could hardly be a clearer indication than the Court's approval of Kretchet's views as qualifying him for conscientious objector status, that the proper construction of the phrase "opposed to participation in war in any form" must be taken to mean opposition to any form of participation in wars which the individual believes contrary to the commands of his religion.

The idea that conscientious objection to the single war then facing the registrant was not a sufficient basis for a C.O. claim seems to have originated in a misreading of dictum in a single case, *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943). Judge Augustus N. Hand had already reached the main holding of the case, that Kauten, an objector to all wars whose beliefs were politically founded, was not entitled to conscientious objector status, when he wrote in dictum that conscientious objection:

> "... must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war." 133 F.2d at 707.

But the significance of this statement can only be understood in light of the following, which reveals the type of "selective" objection to which Judge Hand was referring:

> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. . . . The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has al-

ways been thought a religious impulse." 133 F.2d at 708.

Since Kauten was an objector to all wars—albeit a non-religious objector—the foregoing dictum merely reflects Judge Hand's suggestion that a nonuniversal pacifist is less likely to be religious as the term was then understood. But just as surely, it can hardly be denied, there is also a vast "distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous," and a deeply-felt religious belief that leads an individual to object conscientiously to participation in the particular war he is being faced with. The latter is the position of the Petitioner, and it is hardly described in Judge Hand's words. Furthermore, in the light of this Court's holding in *Welsh* that political considerations may validly play a role in an application for conscientious objector status, the authority of the *Kauten* case is even more questionable.

Gillette's willingness to defend his country if attacked is consistent with conscientious objector status. So long as the *Seeger* and *Welsh* tests are met, so long as his opposition to that war stems from his moral, ethical or religious beliefs about what is right and wrong and these beliefs are held with the strength of traditional religious convictions, so long as his consicence, "spurred by deeply held moral, ethical or religious beliefs, would give [him] no rest or peace" if he became an instrument of that war, he is entitled to 1-O status.

Whatever controversy may exist about selective conscientious objection in other cases is not present here. The question is not whether registrants like Gillette should be

allowed to pick and choose the wars they wish to fight in and those they would avoid. To the extent that a registrant frames his response to a conscientious objector questionnaire in those terms, he may be indicating that his objection to war rests upon considerations of "policy, pragmatism or expediency," 398 U.S. at 343, which the decisions of this Court exclude as a basis for C.O. status. But if his conscience dictates that he refuse to participate in the war that his draft board is then drafting him into, he is not in any sense "selecting" his war. Hypothetical questions about World War II or a United Nations-sanctioned war are of questionable utility in determining his sincerity or the basis of his deeply-held beliefs, anymore than questions about a God-ordained war are proper in determining the beliefs or sincerity of a Jehovah's Witness. They clearly "relate to a contingency" he is not then facing, as the court said in *Owen*, 415 F.2d at 390. Only if in fact a person were actually confronted with two wars, for example, a war in Vietnam which he conscientiously opposed and an American-involved war in Israel which he could be sent to and would fight in, would the problem of "selective" conscientious objection arise. But if a registrant cannot select any other war because it occurred in the past (as World War II) or may hypothetically occur in the future (as a conceivable attack on United States territory) then he is in no sense a selective conscientious objector.[5]

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[5] In a recent decision in Australia, *The Queen* v. *District Court of the Northern District of Queensland and Others; Ex parte Thompson* (1968) 42 A.L.J.R. 173, two members of the High Court came to the same interpretation. Section 29A (1) of the Australian National Service Act exempted those holding conscientious beliefs against "any form of military service." Because of the wording of that law, the High Court concluded that an appli-

One observer has pointed out that a registrant asked about other kinds of wars:

> ". . . may only be refusing to answer dishonestly a series of hypothetical questions: He does not know what he would do if an invading army threatened his family and community. He was too young to face a decision to enter the armed forces in World War II; he cannot be sure he would have refused to use violence against Hitler. All he can know with certainty is that his deepest convictions tell him that for him to kill in today's war, or to participate in institutions that support this conflict, would be wrong and that it would be wrong as well for him to let his government decide this matter for him.
>
> The heart of the matter is not whether an individual's conscience has been tutored by religion, for great numbers of the men who are inducted have been subjected to religious training similar to that of the objector and the inductees come from every one of the nation's traditional denominations. Nor is it whether

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cant must object to being engaged in "military service at all," that is, at all times and places.

However two of the five judges took a broader view in dissent, analyzing the problem in the manner noted above: McTiernan, J. commented:

> "If the inner convictions of what is morally right and morally wrong which a person holds do not allow him to engage in any such act *at the time of his application for exemption*, then, in my opinion, his conscientious beliefs do not allow him to engage in any form of military service within the meaning of s. 29A of the Act . . . In my opinion a person's convictions of moral rightness and wrongness could be such as to give rise to a conscientious belief that any act done by him in any capacity as the result of his obligations as a member of the military forces of the Commonwealth *at a particular time* is contrary to such convictions because of his contribution towards or liability to participate in a particular activity of those forces *at that time*." *Ibid.* 176-177. (Emphasis added.)

See also the opinion of Menzies, J. *Ibid.* 178.

the objector would take the some position with respect to every conceivable armed conflict, for he is usually a young man who has not had occasion to face and think through that many possibilities.

The heart of the matter—the circumstance that must govern the granting or denying of an exemption—is whether what conscription commands of the registrant at the present moment is, for him, a wrong that would do violence to his integrity, a wrong for which the command of government will not relieve him of personal responsibility.

There are sound reasons for exempting such objectors. It makes sense to do so because an attempt to force a man to violate such scruples would be destructive of his personality and demeaning to the government that made the attempt. It makes sense as well because his forced induction would contribute no advantage to the morale and effectiveness of the armed forces, while his imprisonment would be unnecessarily costly to both him and society." Pemberton, "Equality in the Exemption of Conscientious Objectors," Tax, ed. THE DRAFT, 67-68 (1967).

Law, reason, and the Constitution therefore require that a draft board's inquiry into conscientious objection focus on three points: (1) whether the registrant's beliefs are deeply and sincerely held; (2) are these beliefs religiously, morally or ethically binding upon him; (3) do those beliefs require a registrant not to participate in the war in which the government seeks to compel his service. If the answer to those question is "yes", as they clearly are in Gillette's case, he is entitled to conscientious objector status.

C. *The Court Below Improperly Construed Gillette's Conscientious Opposition to Participating in the War in Vietnam as Solely a Political View.*

Both the District Court and the Court of Appeals misconstrued the argument advanced by Petitioner in his conscientious objector claim. The Court of Appeals stated that

> "We reaffirm our holdings in United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966) and United States v. Bolton, 192 F.2d 805 (2d Cir. 1951) that allegations that a particular employment of the armed services is in violation of the Constitution, international treaties or a moral code do not raise a defense to a prosecution for failure to report for induction into the armed forces. For these reasons Gillette cannot successfully challenge the legality of the war in Vietnam in these proceedings." 420 F.2d at 299.

The court's comments relate only to a draftee's *standing* to challenge the legality of the Vietnam War in a prosecution for failure to report for induction. Nevertheless the court came back to the same point when it discussed Gillette's C.O. application, citing the same cases it had relied on for its earlier point.

> "The mere potentiality, arising upon his induction, that Gillette would have to violate his conscientious objection to service in Vietnam is not sufficient to outweigh the application of this exercise of Congressional power to him. See United States v. Henderson, *supra;* United States v. Bolton, *supra. Contra,* United States v. Sisson, *supra,* 297 F. Supp. at 906-911." 420 F.2d at 300.

Similarly Judge Wyatt made the following comments about Gillette's views:

"I do believe that from what was before the board there was a basis in fact for a conclusion by the board that aside from any question of sincerity, the views of this defendant were primarily, if not entirely, based on an opinion, a feeling, a belief, that the Vietnam War, is immoral and unjust" (Tr. 42) (A. 12).

Both courts in their analysis thus confused three separate problems:

(1) the political use of the armed forces which a draftee does not have standing to question since he may not be sent to the war theater involved;

(2) political pragmatism or expediency, as, for example, when a registrant's sole basis for claiming C.O. status is that a war is opposed by his political party;

(3) the political perceptions upon which a valid conscientious objection claim can be based.

A recent law review note commenting on *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968), appeal dismissed, 399 U.S. —— (1970) focused on the problem of political beliefs motivating a conscientious objector and noted the difference between the last two points:

"Though Sisson's beliefs seem to be religious in the *Seeger* sense, it has been suggested that opposition to a particular war is, at least usually, a political decision. To see that this is not universally true, one has only to look to a Catholic who applies his church's traditional doctrine of the just war in determining that he must not participate in a particular conflict. The case of a man like Sisson, who holds respect for human life as a central value in his life, and sees the effect of American participation in Vietnam to be antithetical to this value, should be equally strong. Both of these

men base their objection on fundamental beliefs that, in *Seeger* terms, occupy in their lives a place equivalent to that which the beliefs of an orthodox general objector occupy in his. And each of these men—Sisson, the just-war Catholic, and the orthodox objector—is equally injured when the state seeks to compel them to act in opposition to their fundamental beliefs. If almost all selective objectors based their objections on political grounds, it might be justifiable to adhere to the test of objection to 'participation in war in any form' in order to have a simple administrative test that would be accurate in almost all cases. But given an increasingly well educated population influenced by increasingly sophisticated and heterodox moral and religious doctrines, a court is no longer justified in assuming that very few young men carry out the complex ethical analysis that leads to a conscientious objection limited to a particular war." Comment, "Nonestablishment of Religion," 83 *Harv. Law Rev.* 453, 457-58 (1969).

Obviously, Petitioner is not urging that there is a constitutional right to be exempt from military service in a particular war for one whose objection to that war is based on the fact that it is opposed by his country's political allies; or whose objection is based on his view that it will improve foreign trade with a neutral power; or whose objection is posited on a favoring of certain political or economic or cultural conditions in the country with which we are at war over our own. These are clearly political objections.

But that is not the end of the inquiry. The most religiously sensitive conscience will make so-called "political" judgments, when it passes on political affairs. See, *e.g.*, the works of Martin Buber, Reinhold Niebuhr, Paul Tillich, the Gospels and the Talmud. Unless conscience is to ab-

dicate its responsibilities where public matters are concerned—a position espoused by no religious or other ethic —"political" judgments are necessarily involved. Indeed, does not the total pacifist's objection to participating in any military service necessarily entail "political" decision-making about the nature of war since total pacifism is consistent with personal self-defense? This does not mean that all political questions are moral or vice versa. Although moral decisions are different from political decisions and it is only the former which demand recognition, political considerations may play a crucial part in the most moral of beliefs.

This court in *Welsh* made clear that conscientious objector status cannot rest on political considerations alone:

> "The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to the war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." 398 U.S. at 342-43.

But political analysis and evaluation may well play a part in the development of conscientious feelings about war:

> "We certainly do not think that [Section] 6 (j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." 398 U.S. at 342.

Thus neither the draft board originally nor either court below properly considered the conscientious objector claim

made by Gillette. They construed his comments as directed to the wisdom of American policy in Vietnam rather than as the stimulus for his conscientious objection to participating in that war. Therefore there is no basis in fact for the 1-A classification given to Petitioner. *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969); *United States* v. *Owen*, 415 F.2d 383 (8th Cir. 1969).

II.

It is unconstitutionally discriminatory, in violation of the First and Fifth Amendments, for a statute to authorize conscientious objector status for total objectors, but to deny such status to Petitioner. Moreover, the establishment and free exercise of religion clauses of the First Amendment should be held to require recognition of Petitioner's claim.

A. *Unconstitutional Discrimination Against Religious Beliefs and Establishment of Religion.*

Assuming *arguendo* that the local draft board correctly interpreted the intent of Congress when it decided that Section 6(j) was intended to grant exemptions only to those whose conscientious objection extends to participation in all wars at all times, the relevant parts of Section 6(j) are clearly unconstitutional.

As shown by Petitioner's SSS Form 150 and the letters submitted in support of his C.O. claim, individuals such as Gillette who express sincere objection to fighting in the war then facing them are no less "religious" (as defined in *Welsh* and *Seeger*) than total objectors. The only difference between universal pacifism and the pacifism repre-

sented by Gillette is in terms of the content of the religious beliefs. (See discussion below at Point IIC.)

It is self-evident that neither an act of Congress, nor a Selective Service System regulation, could purport to recognize the conscientious objector claims of one religious group, but refuse to recognize the claims of one or more other groups or of non-believers altogether. There can be no discrimination between the religious beliefs of Quakers and the religious beliefs of Catholics, Methodists or Humanists or, indeed, between Quakers (or Methodists or Humanists) who are total pacifists and Quakers (or Methodists or Humanists) who are selective objectors.

This Court has established beyond cavil that to grant a benefit to adherents of one religious belief while denying it to those of other beliefs is unconstitutionally discriminatory. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Torasco* v. *Watkins,* 367 U.S. 488 (1961). In the *Sherbert* case, the Court said:

> "[I]f the purpose or effect of a law . . . is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect," 374 U.S. at 404, quoting *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961).

In *Torasco,* it said:

> "neither a State nor the Federal Government, can constitutionally pass laws . . . which aid all religions as against non-believers and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U.S. at 495.

Over two decades ago, this Court clearly described what would constitute an improper establishment of religion, in *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."

More recently, the Court has set forth the ideal of religious freedom which the Constitution sought to establish. This ideal is one of

> "absolute equality before the law, of all religious opinions and sects. . . .
>
> "The government is neutral, and, while protecting all, it prefers none, and it disparages none." *Abington School District* v. *Schempp,* 374 U.S. 203, 215 (1963).

The Court has continued to elaborate on the requirements which the First Amendment imposes on the government. Only two years ago, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), the Court eloquently stated these requirements in an opinion which bears quotation:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.
>
> "As early as 1872, this Court said: 'The law knows no heresy, and is committed to the support of no

dogma, the establishment of no sect.' Watson v. Jones, 13 Wall 679, 728, 20 L Ed 666, 676. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command." 393 U.S. at 103-104.

In addition to its violations of the First Amendment, if the Selective Service System denies Petitioner C.O. status, while granting it to others, solely on the basis of an unjustifiable distinction between Petitioner and others on the ground of differences in the content of their religious beliefs, the System is in direct violation of the equal protection guaranty of the Constitution. *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follet* v. *Town of McCormick*, 321 U.S. 573 (1944); *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970); *United States* v. *Bowen*, —— F. Supp. ——, 2 SSLR 3421 (N.D. Cal. Dec. 24, 1969); see *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1969), appeal dismissed, 399 U.S. —— (June 29, 1970). Such denial of equal protection constitutes a denial of due process of law, forbidden by the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *United States* v. *McFadden, supra; United States* v. *Bowen, supra.*[6]

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[6] A recent law review note on the *Sisson* case supports this analysis:

"Deeming some religious beliefs more worthy of protection for such reasons is exactly the choice forbidden by the establishment clause, since state advancement of one class of religion over another is as objectionable as state advancement of religion generally. These considerations suggest that if Sisson's objection is classed as 'religious,' it violates the establishment clause to grant exemptions to some religious objectors but not to him.

As the court held, however, even if Sisson's beliefs are treated as nonreligious there is an equally serious establish-

Justice Harlan noted in his concurring opinion in *Welsh*:

"having chosen to exempt [any conscientious objector, Congress] cannot draw the line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment. See my separate opinion in *Walz* v. *Tax Comm'n*, 397 U.S. 664, 694 (1970); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 305 (1965) (Goldberg, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953). The implementation of the neutrality principle of these cases requires, in my view, as I stated in *Walz* v. *Tax Comm'n, supra*, 'an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to

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ment violation. It could, of course, be suggested in defense of the religious-non-religious distinction that Congress was simply trying to insure the free exercise of religion. So to argue, however, would be to sanction the avoidable pro-religious discrimination in such a policy, involving the sort of preference the establishment clause has been interpreted to forbid. The Supreme Court has read the free exercise clause not in isolation so as to permit state advancement of religion but in connection with the establishment clause so as to require state neutrality insofar as possible. Thus the protection of the first amendment, if given to some conscientious objectors, should extend to Sisson whether or not his beliefs are 'religious.' This conclusion is not altered by his objection being to a particular war, since this limit does not impeach the claim that his objection is a fundamental matter of conscience." Comment, "Nonestablishment of Religion," 83 *Harv. Law Rev.* 453, 461-62 (1969).

fall within the natural perimeter [are included].' 397 U.S. at 696." 398 U.S. at 356-57.

Similarly Justice Douglas, concurring in *United States* v. *Seeger*, stated:

> "If I read the statute differently from the Court, I would have difficulties. For then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we held in *Sherbert* v. *Verner*, 374 U.S. 398, would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497." 380 U.S. at 188.

Notwithstanding the clear constitutional commands contained in the above decisions, Petitioner faces a two year jail sentence, an undeniably greater burden than those suffered by the parties in many of these cases. In *Sherbert*, for instance, the deprivations were in a sense hardly serious at all; the only penalty which would have attached to her continued practice of that which she considered required by her Seventh Day Adventist religion would have been a discriminatory loss of state unemployment compensation, not suffered by persons observing Sunday as their holy day.

As stated by the court in *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970) a decision which upheld the right of a selective conscientious objector to treatment equal to that received by those of other religious beliefs:

> "Such a burden upon the exercise of one's religion can have no place in a society built by men and women

> of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.'" 309 F. Supp. at 506.

It may be asserted by respondent that exemption from service as a conscientious objector is not a right, to be protected as are other constitutional rights, but a mere "privilege," granted by the grace of Congress, which may be withheld at will without running afoul of constitutional requirements. (Point III critically analyzes this position).

But regardless of whether or not there is a right, constitutional or otherwise, to have one's conscientious objection to participation in war recognized, it is clear that once Congress has recognized it for some religious beliefs, the Constitution requires equal treatment for all religious beliefs. As the Second Circuit held in *Seeger* v. *United States*, 326 F.2d 846 (2d Cir. 1964), aff'd on other grounds, 380 U.S. 163 (1965):

> ". . . [I]t now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed.2d 1460 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." 326 F.2d at 851.

B. *Significance of McFadden, Bowen and Sisson Decisions.*

Three recent decisions by Federal district courts have held that this constitutional doctrine applies specifically to the case of the selective conscientious objector. *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Calif. 1970); *United States* v. *Bowen*, 2 SSLR 3421 (N.D. Calif. Dec. 24, 1969); *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass. 1968).

In all three cases it was held that refusal to recognize selective conscientious objection amounts to invidious discrimination based on the content of religious beliefs. As Judge Weigel put it succinctly in the *Bowen* case, but in terms equally applicable to all three:

> "In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion as required by the mandate of the First Amendment." 2 SSLR at 3422.

Bowen was a Roman Catholic, attended parochial schools for most of his formal education and remained a practicing Catholic. The Court specifically found that the doctrine of "just wars" was a central element of Catholic faith.

> "Without presuming then, to make a conclusive statement about what is orthodox Catholic doctrine, this Court concludes from the ample testimonial and doctrinal evidence introduced at trial that at least a substantial number of knowledgeable Catholic leaders count the doctrine of just wars as a basic element of church dogma, that Bowen reasonably believed Cath-

olic doctrine to require that he make his own determination as to whether the war was or was not just and, that having decided it was unjust, conscientiously believed his religious faith made it imperative that he refuse to serve." 2 SSLR at 3421 n. 1.

The Court also noted:

"While not of direct pertinence, it is to be noted that amicus curaie [sic] briefs were brought to the Court's attention which documented the view that communicants of other faiths—Protestant and Jewish—have ample doctrine in their religions to support similar religious conscientious objection." *Ibid.*

The Court pointed out that:

"An examination of the practical effect of Section 6(j), based on judicial notice, the amicus briefs, and the extensive testimony in this case, leads necessarily to the conclusion that members of traditionally pacifist religions—such as Quakers and Jehovah's Witnesses—are generally exempted from military service while members of other religions—such as Bowen's Roman Catholic faith—are not so exempted." 2 SSLR at 3422.

It was concluded that Section 6(j) violated both the Establishment Clause and the Due Process Clause as a denial of equal protection.

McFadden was also a Catholic and he studied for the priesthood at Pope Pius X Seminary College. Although he decided to forego that calling, he remained a sincere member of the faith. Judge Zirpoli recognized that Catholic dogma perceived a difference between "just" and "unjust wars." He noted the dilemma that this placed on McFadden:

"The first issue is whether Section 6(j) of the Selective Service Act places such a burden upon the religious beliefs of the defendant so as to violate the free exercise clause of the First Amendment. Section 6(j) exempts from military service only those persons whose religious beliefs forbid them to participate in 'war in any form' (in short, any and all wars). The defendant is therefore made to choose between violating his religious beliefs against entering an 'unjust' war, or affirming those beliefs and suffering a possible five-year jail sentence and a possible $10,000 fine. The statute in question puts the most direct burden on the Catholic selective objector—a criminal penalty."

* * * * *

"In the case before the court the statute forces defendant McFadden to choose between following the precepts of his religion and going to jail or abandoning these precepts in order to avoid jail. Indeed, the case of defendant McFadden is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief —the killing of another human being in the cause of an unjust war." 309 F. Supp. at 505, 506.

The court concluded that the Free Exercise and Establishment Clauses as well as the Due Process Clause barred prosecution of individuals in McFadden's position.

The *Sisson* case did not involve a member of an established faith. However the court specifically found that Sisson was both sincere and highly ethical.

"Nor was Sisson motivated by purely political considerations. Of course if 'political' means that the area of decision involves a judgment as to the conduct of a state, then any decision as to any war is not without some political aspects. But Sisson's table of ulti-

mate values is moral and ethical. It reflects quite a real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp. at 905.

Judge Wyzanski noted that there were impressive competing claims in the situation before him: the public and individual interest in common defense and the public and individual interest in liberty of conscience:

"every man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. The freedom of all depends on the freedom of each. Free men exist only in free societies. Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices—'That which opposes, also fits.'

* * * * *

"The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general, but to a particular war or to a particular type of war. Indeed a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience and a deeper spiritual understanding." 297 F. Supp. at 908.

The court concluded that the rationale of this Court's *Seeger* decision "is quite sufficient for Sisson to lay valid

claim to be constitutionally exempted from combat service in the Vietnam type of situation." 297 F. Supp. at 909.

The court engaged in a balancing test between the government's need for Sisson at that moment and his right to follow his conscience:

> "The chief reason for reaching this conclusion after examining the competing interests is the magnitude of Sisson's interest in not killing in the Vietnam conflict as against the want of magnitude in the country's present need for him to be so employed." 297 F. Supp. at 910.

Furthermore the Establishment Clause was also violated:

> "A Quaker, for example, is covered if he claims belief in the ultimate implications of William Penn's teaching.
>
> Persons trained in and believing in other religious ways may or may not be covered. A Roman Catholic obedient to the teaching of Thomas Aquinas and Pope John XXIII might distinguish between a just war in which he would fight and an unjust war in which he would not fight."
>
> • • • • •
>
> "Earlier this opinion noted that it is practical to accord the same status to non-religious conscientious objectors as to religious objectors. Moreover, it is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings." 297 F. Supp. at 911.

Petitioner respectfully urges that the constitutional reasoning and holdings in the three District Court cases reflect a sound emerging doctrine and should be adopted by this Court.

As all of the above cases have noted, no right is absolute; there may always be exceptions to its enforcement. But where a right arises out of the First Amendment, as do the rights asserted by Petitioner here, that right is accorded especially strong protection; it can only be abridged by a showing of the most compelling interest on the part of the government, and a lack of available alternative means for attaining the end sought by the government. *Sherbert* v. *Verner, supra,* 374 U.S., at 406-407. The heavy burden thus placed upon the government is not met in this case; indeed, an examination of the facts demonstrates that, if anything, the most compelling interest of the government lies in granting the claim of Petitioner and others like him.

The commands of the Constitution are clear. If an exemption from military training and service is granted to those whose religious beliefs require that they not participate in all wars, the exemption must equally be given to those whose beliefs compel refusal to participate in the particular war then facing them.

C. *Abridgment of Free Exercise of Religion*

The protection sought for religious liberty and conscience applies no less forcefully to those whose scruples dictate that they abstain from a particular war, than it can to those opposed to all wars. The discriminating religious objector follows a tradition recognized by Christians for more than 1,500 years, when he undertakes to assess whether a con-

flict is a "just war." See, e.g., St. Augustine, *City of God,* Book XIX, ch. 7 (Image Books ed., 1958); St. Thomas Aquinas, *Summa Theologiae,* First Part of the Second Part, Question 105(3); "Deliverance on Rights and Responsibilities of Public Dissent," Social Deliverances of the 178th General Assembly of the United Presbyterian Church U.S.A., *Social Progress,* July-August 1966, 26-30, especially 28; see, also, R. Bainton, *Christian Attitudes Toward War and Peace* (1960) *passim* (tracing the concept of the just war back to the Old Testament, and classical and early Christian thinking which influenced St. Augustine); Finn, *A Conflict of Loyalties* (1968) *passim;* Potter, "Conscientious Objection to Particular Wars," 4 *Religion and the Public Order,* 44, 66-70 (1968); see generally, Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War,* 3 Harv. Civil Rights-Civil Liberties L. Rev. 1, 10-15 (1967).

Besides the Catholic Church, many Protestant faiths have accepted the proposition that objection to a particular war is morally justifiable. In October, 1969, the Board of Christian Social Concerns of the United Methodist Church issued a statement which said, in part:

> ". . . [W]e ask that all those who conscientiously object to preparation for or participation in *any specific* war or all wars be granted legal recognition and assigned to appropriate civilian service. . . . " (Emphasis supplied.)

In June, 1967 the General Synod of the United Church of Christ passed the following pronouncement:

> "Therefore be it resolved that the General Synod of the United Church of Christ recognize the right of con-

scientious objection to participation in a particular war or in war waged under particular circumstances, as well as the right of conscientious objection to participation in war as such; and

"Be it further resolved that the General Synod remind those who are disposed to take this position that they ought not to do so lightly but only after careful examination and weighing of their own motives, the moral issues at stake including their proper obligations to the nation as an instrument of justice and order, the social as well as personal consequences of their decision, and their readiness to accept military or civilian service of equivalent time, risk and personal inconvenience if afforded them, or else such penalties as may be legally imposed; . . ." Finn, *op. cit.*, ix.

The United Presbyterian Church and the American Baptist Church have adopted similar resolutions. *Ibid.* viii. In July 1968, the World Council of Churches meeting in Uppsala, Sweden voted almost unanimously in favor of the following resolution:

"protection of conscience demands that the churches should give spiritual care and support not only to those serving in armed forces, but also to those who, especially in the light of the nature of modern warfare, object to participation in particular wars they feel bound in conscience to oppose." *The New York Times*, July 17, 1968, p. 1. Col. 3.

The Jewish religion has similar traditions. One scholar after analyzing the general Judaic principles against war has characterized the position as follows:

"It seems evident from the foregoing that Judaism cannot be characterized, in the strict sense of the term, as a 'pacifist' tradition. It seems equally evident that

> Judaism does not regard every war as permissible, nor does it regard every means of prosecuting war as permissible. It is further evident that while Judaism is highly respectful of duly constituted authority, this does not absolve the individual from the duty of making responsible moral decisions. Neither these moral decisions nor their bases are delegated to human authority in any unchallengeable way.
>
> If the above be an accurate rendering of an essential part of the Jewish tradition, it would appear that 'selective' conscientious objection on moral grounds is a fundamental teaching of Judaism and a fundamental demand of its adherents." Gendler, "War and the Jewish Tradition," in Finn, *op. cit.*, 78, 100.

As Judge Wyzanski held in *Sisson,* and as Judge Zirpoli reasoned in *McFadden,* the free exercise clause of the First Amendment, regardless of statute, should protect someone whose religious beliefs command him to refrain from participation in war—all war, or any war.[7] In interpreting the

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[7] See also Macgill, "Selective Conscientious Objection: Divine Will and Legislative Grace," 54 *Virginia Law Rev.* 1355, 1376-77 (1968): "It must be granted that there is a Just War doctrine, that the doctrine is a part of the teachings of admittedly religious denominations, and that the doctrine requires believers to pass judgment on a war before participating in it. It follows that if a member of one of those denominations actually does apply the doctrine to a particular war and finds he cannot participate in it, his claim as a selective objector would have a religious basis. The fact that temporal considerations figured in the decision upon which his claim is based does not negate the religious character of that decision, nor that of the opposition itself as an exercise of his religion. No matter how many political factors he may have weighed, and no matter how personal some of his judgments may have been, his asserted belief and claim do not rest solely on nonreligious considerations. If this is true for a selective objector who belongs to a denomination which recognizes the Just War doctrine, it must be true as well for the selective objector whose religious scruples may be informal, individual, and recognizable only to [the late Professor Paul] Tillich or the Supreme Court."

religious liberty clause, the Supreme Court has occasionally engaged in a balancing process, but it has made it clear that where religious liberty is at stake, the balance weighs heavily against the asserted governmental need. See *Sherbert* v. *Verner, supra; In re Jenison,* 265 Minn. 96, 120 N.W.2d 515 (1963), remanded for consideration in light of *Sherbert,* 375 U.S. 14, 267 Minn. 136, 125 N.W.2d 588 (1963); *United States* v. *McFadden, supra,* 309 F. Supp. at 507.

There have been cases where the government was permitted to abridge the free exercise of certain religions, but such cases are clearly distinguishable from the present one, and can have little application here except by way of contrast. First, it should be noted, these cases dealt with statutes or regulations which sought to restrain the persons involved from taking certain actions. As the court stated in *McFadden, supra,* these restrictions "dealt with the protection of society's health and morals from affirmative acts required by the religion." 309 F. Supp., at 505. See, e.g., *Reynolds* v. *United States,* 98 U.S. 145 (1878), dealing with the early Mormon practice of polygamy; and *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944) dealing with a Jehovah's Witness who compelled a child to sell religious magazines in violation of the state's child labor laws. The latter case, especially, points up the distinction to be made here, for while the restraint on the affirmative acts of the Witnesses was upheld in *Prince,* the courts were simultaneously preventing the government from forcing members of the same sect to serve in the armed forces contrary to their beliefs. Many years ago, Chief Justice Stone, before his elevation to the Supreme Court, described the distinction thus:

> "[C]ompelling the citizen to refrain from doing an act which he regards as moral and conscientious does not do violence to his conscience; but his conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong." Stone, "The Conscientious Objector," 21 Columbia Univ. Quart. 253, 268 (1919).

A second distinction between such cases as *Reynolds, supra,* and *Prince, supra,* and the present one is that in the former cases, there was no element of establishment of religion; the members of no other religious faith or sect had been granted the right to do what the parties there sought. But in the present case, many persons are by the statute permitted to have their beliefs recognized and respected, and are granted exemption from military service; it is only those whose beliefs are similar to Petitioner's who are denied the exemption. This, as we have already seen, must constitute not only an abridgement of the free exercise of the Petitioner's religion, but also an establishment of religion; it is therefore impermissible under *Epperson, supra, Everson, supra,* and like cases.

The final consideration in determining whether Petitioner's claim of religious liberty should be recognized is the magnitude of his claim. He is not asking to be relieved of a Sunday closing law; or a tax which he finds religiously offensive; or a requirement that he report for work on his Holy Day or suffer loss of unemployment compensation; or compulsory jury duty; or even a child labor law which interferes with the religious education of his children. He is saying that participation in the Vietnam War in any form is so obnoxious to his innermost religious beliefs that he is compelled to reject any participation in it. He is saying

that his religious beliefs would give him "no rest or peace," *Welsh* v. *United States*, 398 U.S. at 344 if he allowed himself to remain part of an instrument of this war. There is a profound difference between any other command which the state imposes on its citizenry, and the command that the citizen kill other human beings.[8] There can be no more noble expression of the amplitude of the religious liberty guaranty than to respect the religious belief of the citizen who cannot kill.

III.

The right to conscientious objector status must be considered of constitutional dimension and must be given the broadest possible protection by this Court.

Justice Harlan noted in his concurring opinion in *Welsh* that "Congress, of course, could entirely consistent with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."[9] 390 U.S. at 356. However, there is both historical evidence and Constitutional development contrary to this position. And if the right is

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[8] See Redlich and Feinberg, "Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill." 44 *N.Y.U. Law Rev.* 875 (1969). When the government "orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System: Actualities and Alternatives" in Finn (ed.), *A Conflict of Loyalties*, 240, 252 (1968).

[9] But see *contra*, *United States* v. *Sisson*, *supra*, 297 F. Supp. at 907-908; Thomas Reed Powell, "Conscience and the Constitution," in W. Hutchinson, ed., *Democracy and National Unity*, 18 (1941): "Notwithstanding all judicial declarations, it has not been actually decided that a conscientious objector, not within any group exempted by Congress, can be put into the front-line trenches or put into the army where certain refusals to obey orders may be punished by death."

found to be of Constitutional dimension, it must be as broadly interpreted as all other vital rights of the people.

A. *Historical Evidence.*

The history of the conscientious objector experience in America shows that it has always been considered of great constitutional importance. Legal protection of conscientious objectors was afforded as early as 1673 in Rhode Island (Selective Service System, Special Monograph No. 1, 2 *Backgrounds of Selective Service*, pt. 12, at 13 (1947), Rhode Island Act of August 13, 1963). The law not only exempted all those who had conscientious scruples against bearing arms but also imposed no militia fine or alternate service. (See Brock, *Pacifism in the United States*, 41 (1968)). Later laws in that colony required objectors to perform other duties such as fire-fighting, removing women and children from places of peril or "any other duty consistent with Religious Principles." (*Backgrounds*, pt. 12 at 56, 59.)

Other colonies followed suit. New York passed a law in 1755 exempting Quakers from militia duty on payment of a commutation fee or the furnishing of a substitute (*Backgrounds* pt. 9 at 186). Massachusetts in 1757 permitted Quakers to pay a militia fine in lieu of service (*Backgrounds*, pt. 6 at 195) and a Virginia law of 1766 allowed those with religious scruples to provide a substitute (*Backgrounds*, pt. 14 at 249). North Carolina also excused Quakers from mustering with the militia (*Backgrounds*, pt. 10 at 46).

Pennsylvania (which was under the political control of the Quakers during most of the colonial period) relied on

a voluntary militia until 1757, but the law passed in that year had generous provisions for objectors:

> "All Quakers, Mennonists, Moravians, and other conscientiously scrupulous of bearing arms, who shall appear on any alarm with the militia, though without arms, and obey the commands of the officers in extinguishing fires, suppressing insurrection of Slaves or other evil-minded persons during an attack, in caring for wounded, conveying intelligence as expresses or messengers, carrying refreshments to such as are on duty, and in conveying to places of safety women and children, aged, infirm, and wounded persons, are free and exempt from the penalties of the act." Selective Service System, Special Monograph No. 11, 1 *Conscientious Objection,* 30 (1951).

By the eve of the Revolutionary War most of the colonies had generous provisions exempting those religiously scrupulous from bearing arms. Even after the war broke out, this policy was not altered. On June 30, 1775 the Pennsylvania Assembly urged the citizens of the state to recognize the validity of the objector's claims of conscience:

> "The House taking into consideration that many of the good people of this Province are conscientiously scrupulous of bearing of arms, do hereby earnestly recommend to the Associators for the Defense of their Country, and others, that they bear a tender and brotherly regard toward this class of their fellow-subjects and Countrymen; and to these conscientious people it is also recommended, that they cheerfully assist, in proportion to their abilities, such associators as cannot spend their time and substance in the public service without great injury to themselves and families." 1 *Conscientious Objection,* at 33.

The Continental Congress was also quick to assure conscientious objectors that their beliefs would be respected. On July 18, 1775 it passed the following resolution:

> "As there are some people who from Religious Principles cannot bear Arms in any case, this Congress intend no Violence to their Consciencies, but earnestly recommend it to them to Contribute Liberally, in this time of universal calamity, to the relief of their distressed Brethren in the several Colonies, and to do all other services to their oppressed country, which they can consistently with their Religious Principles." *Ibid.*, 33-34.

At the same time, many states were going even further to protect the rights of objectors. Aside from the specific statutory protection which was present in almost all the colonies, no less than six states included conscientious objector provisions in the constitutions passed during the Revolutionary period as part of the basic rights of their citizens.[10] Pennsylvania led the way in 1776. Article VIII of the Declaration of Rights to the Pennsylvania Constitution specified:

> "VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and to yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives:

[10] While the conscientious objectors of the Revolutionary War came almost exclusively from the established peace churches, there were a number of isolated instances of war resistance among individuals who belonged to no established denomination. See Brock, *op. cit.* pp. 278-84.

> Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws but such as they have in like manner assented to, for their common good." Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, vol. V, p. 3081 (1909).

Delaware included an almost identical provision in Section 10 of its 1776 Declaration of Rights (see Laws of the State of Delaware, 1700-1797, vol. I, Appendix, p. 79 (1797)). Vermont did the same in its 1777 Constitution (Section 9) (Thorpe, *op. cit.*, vol. VI, p. 3737), and New Hampshire, in its Bill of Rights of 1783 (Article XII and XIII) (See Thorpe, *op. cit.*, vol. IV, p. 2453). See also Article X of the Massachusetts Declaration of Rights (1780) (*Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 1779-1780*, p. 222 (1832)).

New York included a more detailed provision specifically to protect the Quakers. Article XL of the 1777 New York Constitution specified:

> "That all such of the inhabitants of this State being of the people called Quakers as, from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature; and do pay to the State such sums of money, in lieu of their personal service, as the same may, in the judgment of the legislature, be worth." Thorpe, *op. cit.*, vol. V, p. 2623.

After the war, the protection to be afforded conscientious objectors was still of great concern to the statesmen of the time. One of the objections raised to the proposed federal

Constitution in 1787 was that no protection was afforded those religiously scrupulous of bearing arms. North Carolina on August 1, 1788 passed a Declaration of Rights Resolution which proposed that certain amendments be made to the Federal Constitution. Among these amendments was No. 19: "That any persons religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." 4 Elliott's *Debates* 243, 244 (2d ed. 1836). Virginia adopted a resolution with the same proposal. 3 Elliott's *Debates* 657-659. Rhode Island at the time of ratification of the United States Constitution, June 16, 1790, declared that certain amendments be accepted. Among these was No. 18 which contained the exact language of the earlier North Carolina amendment No. 19. 1 Elliott's *Debates* 334, 335. In the debates by the Pennsylvania Legislature on adoption of the Federal Constitution an objection was voiced that Congressional power was too broad and that ". . . they may coerce men to act in the militia, whose consciences are against bearing arms in any case." 2 Elliott's, *Debates*. 531.

Minority members of the Pennsylvania convention urged in the strongest terms that protection for conscientious objectors be written into the federal Constitution.

> "Secondly, the rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the state. . . .
>
> [During the Revolution] the framers of our State Constitution made the most express and decided declaration and stipulations in favor of the rights of

> conscience; but now, when no necessity exists, those dearest rights of men are left insecure." J. McMaster & F. Stone, *Pennsylvania and the Federal Constitution, 1787-1788*, 480-81 (1888).

Since the Constitution had been ratified only on the implied promise that a federal bill of rights would be promptly appended to it, James Madison moved quickly in Congress to introduce a series of proposed amendments to protect individual rights. One of his proposals, which became the Second Amendment, specifically excused conscientious objectors from militia service:

> "The right of the people to keep and bear arms shall not be infringed; a well armed and well-regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 *Annals of Congress*, 1st Cong., 433.

The proposed Bill of Rights was referred to a Select Committee of Eleven which suggested even more generous protection for objectors, not even suggesting the furnishing of a substitute or any equivalent service:

> "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 *Annals*, 749.

Debate on the provision took place on August 17, 1789. There were various objections raised to the proposal. Some representatives wished to insure that some equivalent service or payment be required. Thus Representative James Jackson of Georgia stated:

> "Mr. Jackson did not expect that all of the people of the United States would turn Quakers or Moravians; consequently one part would have to defend the other in case of invasion. Now, this, in his opinion, was unjust, unless the Constitution secured an equivalent; for this reason, he moved to amend the clause, by inserting at the end of it, 'upon paying an equivalent, to be established by law.'" *Ibid.* at 750.

But objection was raised to this amendment: Roger Sherman of Connecticut noted: "It is well known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; . . ." *Ibid.* John Vining of Delaware agreed:

> "Mr. Vining hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight." *Ibid.* 751.

A more serious question was raised by Roger Sherman. He pointed out that the states would have the primary responsibility for organizing the militia and presumably would grant generous exemptions as they had in the past. "The States, respectively, will have the government of the militia, unless when called into actual service; . . ." *Ibid.* 750. This argument was picked up by Egbert Benson of New York who suggested that the entire conscientious objection clause be eliminated for that reason. "He would always leave it to the benevolence of the [State] Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. . . . I have no reason to believe but the [State] Legislature

will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." The proposal to exclude the clause was defeated, 24 to 22. *Ibid.* 751.

However, three days later the debate resumed. Again it was proposed that an equivalent be demanded. 1 *Annals* 766. Elias Boudinot of New Jersey insisted on broad protection, however:

> "Mr. Boudinot thought the provision in the clause, or something similar to it, was necessary. Can any dependence, said he, be placed in men who are conscientious in this respect? or what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them? He adverted to several instances of oppression on this point, that occurred during the war. In forming a militia, an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms" (*Ibid.* at 767).

Eventually, the Senate eliminated the conscientious objector clause. (See E. Dumbauld, *The Bill of Rights and What It Means Today,* 46 n. 9 (1958).) However, the House debates during 1789, just discussed, and later in 1790 (when the Uniform Militia Bill was under consideration) indicate that the deletion was made to protect rather than restrict the rights of conscientious objectors.

It seems clear the framers thought that the federal national army would be made up only of volunteers so the problem of conscientious objection would not arise in that area.[11] Thus, the only way in which a citizen could be compelled to render military service was through the state militia. But the states already had generous provisions on relieving conscientious objectors from compulsory service. Since there was strong sentiment in Congress for demanding some equivalent payment in lieu of service, any nationwide rule would hurt the conscientious objectors living in those states which exempted them from all military duty and any militia fine.

This approach is clearly shown in the debates on the Uniform Militia Bill in December 1790. Secretary of War Henry Knox introduced a plan for the federal government to organize all the citizens of the militia, excluding "exempts of religious sects." The latter would, however, have to pay an equivalent fine. Aedenus Burke of South Carolina objected to the tax:

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[11] See Friedman, "Conscription and the Constitution: The Original Understanding," 67 *Mich. Law Rev.* 1493 (1969). The historical evidence supporting the view that no power to conscript was given the federal government include explicit remarks by Edmund Randolph when he introduced the plan that became the Constitution: "What reason to expect that the treasury will be better filled in the future, or that money can be obtained under the present powers of Congress to support a war. Volunteers not to be depended on for such a purpose. Militia difficult to be collected and almost impossible to be kept in the field. Draughts stretch the strings of government too violently to be adopted. Nothing short of a regular military force will answer the end of war, and this only to be created and supported by money." *Ibid.* at 1513 quoting 1 Farrand, *Records of the Federal Convention* 25 (1911); see also *The Federalist Papers* 8, 24, 25, 41; (*Ibid.* 1520 ff.); numerous comments at the State Ratifying Conventions (*Ibid.* 1525 ff.) and many steps taken by the First Congress (*Ibid.* 1535 ff.).

> It was contrary to the Constitution . . . to lay a tax upon certain classes of citizens; not being consonant with the principles of justice to make those conscientiously scrupulous of bearing arms pay for not acting against the voice of their conscience. This, he said, was called the land of liberty, in it, we boasted, that no one suffered on account of his conscientious scruples, and yet we are going to make a respectable class of citizens pay for a right to a free exercise of their religious principles; it was contrary to the Constitution; it was contrary to that sound policy which ought to direct the House in establishing the militia. 2 *Annals of Congress,* 1 Cong., 2nd Sess., 1818.

James Jackson objected to total exemption:

> [I] certainly should oppose the principle started by the gentlemen last up. Who are to know . . . what persons were really conscientiously scrupulous? There is no tribunal erected to make them swear to their scruples. If the principle were adopted, . . . very few would be found, if their own word was to be taken, not conscientiously scrupulous. There were other sects . . . besides the Quakers averse to bearing arms. If the principle be adopted of requiring no compensation from the exempted, it will lay the axe to the root of the militia . . . the bill might as well be postponed altogether. *Ibid.*

John Vining spoke highly of the Quakers' principles but recognized that same equivalent should probably be demanded of them.

> "With respect to the Quakers, he replied to some observations of Mr. Jackson, who had asked what will become of our boasted independence in case of the exemption of the Quakers? He asked, were there no Quakers in the late war? He adverted to the conduct

of the first settlers of Pennsylvania, who were Quakers; their peaceful principles were productive of the happiest consequences; and in this view their conduct had been an example, which, in proportion as mankind shall recede from the force of turbulent passions, will be more and more imitated. He, however, supposed that an equivalent might be assessed on these people without difficulty, and which, from their numbers, supposed to be one-twentieth part of the people, would amount to a sum sufficient to support a militia; at least, to furnish them with arms, drums, colors &c." *Ibid.* at 1823.

James Madison also came around to this point of view:

"Mr. Madison moved to insert among the exemptions, persons conscientiously scrupulous of bearing arms. It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved than has heretofore been known. The Quakers merit some attention on this delicate point, liberty of conscience. When they had it in their power to establish their religion by law they did not. He was disposed to make the exemption gratuitious, but supposed it impracticable. He replied to Mr. Jackson's observations, that exempting such persons would induce the people generally to turn Quakers. He did not believe that the citizens of the United States would hypocritically renounce their principles, their conscience, and their God, for the sake of enjoying the exemption." *Ibid.* at 1824.

Roger Sherman continued to press for complete exemption and James Jackson insisted any recognition of conscientious objection would "destroy the whole militia bill" (*Ibid.*, 1825). Finally Benjamin Bourn of Rhode Island pointed out how a uniform rule of the type proposed would hurt the Quakers rather than help them.

"Mr. Bourne [sic] observed, that if the General Govern ment should take up the matter, and subject th Quakers to a penalty as an equivalent for persona service, their situation would be rendered less eligibl than it is at present; for, in several of the States, the are not only exempted from militia duty, but from al fines and penalties in lieu thereof. He instanced th States of New Hampshire, Massachusetts, Rhod Island, and Connecticut." *Ibid.* at 1827.

Eventually this view prevailed and no mention was made of conscientious objectors in the 1792 Militia Act. (Act of May 8, 1792, ch. 33, 1 Stat. 271.)

The only fair reading of the debates in 1789 and 1790 was that conscientious objection was viewed by the framers as a vital constitutional right of those with religious scruples about bearing arms. The fact that six states included provisions in their Constitutions to protect such rights and that four states recommended similar provisions in the federal Bill of Rights shows the importance attributed to that dictate of conscience. It was only because the states already protected that right and no need seemed to exist for blanket federal protection that no specific clause was inserted in the federal Bill of Rights. Had Madison and the statesmen of that time known that the Supreme Court would decide in the *Selective Draft Law Cases,* 245 U.S. 366 (1918) that the federal government could draft citizens directly into a federal army, they most certainly would have retained some guaranty for those conscientiously scrupulous of bearing arms.

B. *Constitutional Interpretation.*

The idea that Congress could do away with conscientious objection altogether had its roots in dicta found in *United States* v. *Macintosh,* 283 U.S. 605, 624 (1931):

> "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege." [12]

The point was repeated by the Court (and by Justice Cardozo in his concurring opinion) in *Hamilton* v. *Regents,* 293 U.S. 245, 264, 266-67 (1934). Although Congress, many courts, and most commentators have continued to hold to this position,[13] the proposition is in serious question following this Court's recent decisions interpreting the Free Exercise and Establishment Clauses in the First Amendment.

In the first place, *Macintosh* was itself explicitly overruled in *Girouard* v. *United States,* 328 U.S. 61 (1946). The idea that the state with impunity may force a citizen to do acts which violate his conscience has been firmly rejected by

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[12] But the very next sentence in the Court's opinion indicates there may be some limits on that power: "No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, *in the last extremity,* to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general." (Emphasis supplied.) See note 9, *supra.*

[13] See Note, "The Conscientious Objector and the First Amendment: There but for the Grace of God. . . ." 34 *Univ. of Chic. Law Rev.* 79, 80 (1966).

this Court. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). *Abington School District* v. *Schempp*, 374 U.S. 222 (1963). As Chief Justice Hughes wrote in dissent in *Macintosh* expressing a view which eventually prevailed in *Girouard*,

> "... in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. ...
>
> "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. ...
>
> "... putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field." 283 U.S. at 633, 634.[14]

[14] It should also be noted that Professor Macintosh was a "selective" objector to war, stating that he would fight only in a war that was morally justified. Chief Justice Hughes commented: "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples

Secondly, the *Schempp*, *Sherbert*, and *Torasco* cases *supra* make clear that strict neutrality in matters of religion must be maintained by the government in all relations with different groups of citizens. It may neither prefer one over the other or encourage all against non-believers. Nor can it impose any unnecessary burden on believers unless an overriding necessity were shown. If Congress were to repeal Section 6(j) and deny conscientious objector status to everyone, including the most devout Quakers or Mennonites, they could justly complain that the neutrality of the state with respect to religion was being breached. Such a step, going to the heart of the religious beliefs of many recognized sects, would be contrary to the explicit intent of the framers of the Constitution, contrary to the spirit of the First Amendment, and contrary to the religious nature of the people. If the mere forfeiture of benefits in the *Sherbert* case imposed a burden on the free exercise of religion, *a fortiori* governmental compulsion under penalty of the criminal law to make all able-bodied members of the historic peace churches serve in the army in violation of the central tenet of their religions could not pass Constitutional muster.

Since the government is compelled under the First Amendment to respect religious liberty and accommodate state power to the Free Exercise Clause, it must grant the exemption. This Court said in *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952):

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against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. *For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.*" (Emphasis added.)

Applying this approach, recognition of conscientious objection rises to a Constitutional right:

> "Were the Court to adopt the accommodation theory in passing on the constitutional claim of the conscientious objector, it is certain that the claim would be upheld, as the force of the establishment clause limitation would be minimized. Under the doctrine of *Zorach* and the logic of *Sherbert*, the government would be required to accommodate the needs of national defense to the religious needs of its people, and provide an exemption for the conscientious objector. This result is strengthened by the facts shown earlier which indicate that granting the exemption has a negligible effect on the maintenance of national defense." Note "The Conscientious Objector and the First Amendment: There but for the Grace of God . . .," 34 *Univ. of Chic. Law Rev.*, 79, 91 (1966).

Once it is shown that the Free Exercise Clause of the First Amendment protects at the very least the traditional conscientious objector claims made by the Quakers and other peace sects, the Establishment and Due Process Clauses require all other citizens similarly inspired to be similarly treated. (See Point II above.)

There is no difficulty in defining the proper scope of the constitutional right to recognition of conscientious objection. A wealth of history exists as to how the exemption

had been treated throughout our nation's existence. As shown below in point IV there will be no serious burden placed upon the government in recognizing the exemption as a constitutional right. As Chief Justice Stone said in his famous article on conscientious objection:

> "The ultimate test of the course of action which the state should adopt will of course be the test of its own self-preservation; but with this limitation, at least in those countries where the political theory obtains that the ultimate end of the state is the highest good of its citizens, both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." "The Conscientious Objector," 21 *Columbia Univ. Quart.* 253, 269 (1919).

IV.

No other competing Government interest can justify denial of conscientious objector status to individuals in Petitioner's position.

A. *Administrative Convenience.*

Various reasons have been offered to justify the denial of claims of so-called selective conscientious objectors. Among them are the anticipated proliferation of claims, and the difficulty of detecting false claims. Neither of these reasons, however, is even remotely sufficient. Both are essentially arguments of administrative convenience of the sort which the Supreme Court has many times held to be insufficient grounds for the abridgement of rights protected by the First Amendment. Cf. *NAACP* v. *Button,* 371 U.S. 415 (1962); *Thomas* v. *Collins,* 323 U.S. 516 (1945); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Schneider* v. *State,* 308 U.S. 147 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

As to multiplicity of claims, the same allegation was raised at the time of the *Seeger* decision, *supra,* but the problem has not arisen. In its latest available figures (of June 30, 1970) the Selective Service System lists 40,303,654 registrants and only 19,714 1-O's; 9,189, 1-W's (individuals then engaged in work of national importance) and 11,743 1-W's released. These total 40,646 or only one-tenth of one per cent of the total registrants.

The alleged problem of false claims was raised in *Sisson, supra,* but as Chief Judge Wyzanski noted:

> "The suggestion that courts cannot tell a sincere from an insincere conscientious objector underesti-

mates what the judicial process performs every day. Ever since, in *Edginton* v. *Fitzmaurice* (1882), L.R. 29 Ch. Div. 359, Bowen, L. J. quipped that 'the state of a man's mind is as much a fact as the state of his digestion,' each day courts have applied laws, criminal and civil, which make sincerity the test of liability." 297 F. Supp., at 909-910.

Cf. *United States* v. *McFadden, supra,* 309 F. Supp., at 508. And even if it should arise, the Supreme Court has most explicitly rejected such an argument in other areas.

"For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights." *Sherbert* v. *Verner, supra,* 374 U.S., at 407 (emphasis added).

The experience of Great Britain during World War II shows that the administrative problems for particular objectors were hardly noticeable. Under Section 5 of the National Service (Armed Forces) Act of 1939 (2 & 3 Geo. 6 c. 81) any person who claimed that:

". . . he conscientiously objects

(a) To being registered in the military service register, or

(b) To performing military service, or

(c) To performing combatant duties . . . may . . . apply in the prescribed manner to be registered as a conscientious objector.

The law neither required a religious test nor raised any question about objecting to all war rather than a particular

war. Mr. Fenner Brockway (now Lord Brockway) explained:

> "The test was not the ground of objection but the depth of the objection. If an applicant convinced them that he held his convictions so rootedly that they represented to him an issue of right or wrong in his own conduct they exempted him, despite the fact that in another war he might take up arms." Preface to Hayes, *Challenge to Conscience* (1949).

The number of men applying for C.O. status remained extremely low. In October 1939, 222 out of every 10,000 registered claimed conscientious objection; by 1942, the number fell to 36 per 10,000 and remained low for the rest of the war. Over 60,000 claims were made, 43,000 of which were granted, or about 0.5% of a total registration of 8,123,000. (See Sibley and Jacob, *Conscription of Conscience: 1940-1947*, 5 (1952); Cornell, *The Conscientious Objector and the Law*, 119-138 (1943). MacGill, "Selective Conscientious Objection: Divine Will and Legislative Grace," 54 *Virginia Law Rev.* 1355, 1381, n. 101; Note, 34 *Univ. of Chic. Law Rev.* 79, 89, 103-04 (1966).)

These reports also indicate that the way of the conscientious and particularly the selective conscientious objector, is hard indeed. See Sibley and Jacob, *op. cit.* 315-19, 459-64. Understandably, few seek conscientious objector status especially in a nation which does not cheerfully tolerate active dissent in times of international crisis. "This is borne out by the experience of the American Civil Liberties Union that notwithstanding its stated readiness to accept selective conscientious objector cases for almost three years, only a handful of men have come forward." Book Review, New York Times, Nov. 2, 1969, pp. 10, 12.

B. *Maintenance of Morale and Efficiency in the Armed Services.*

One of the purposes of Congress in granting exemptions to conscientious objectors was also presented forcefully in the 1940 hearings of the House Military Affairs Committee. Thus, it was said by Congressman Faddis:

> "And, secondly, I am sure if I were to go out and command the troops—and I may—I don't want any conscientious objectors in my regiment at all. I would rather they would be some place else. They would be more bother than they would be worth, and a bad example to other men. You could not do anything with them in the way of soldiers and somebody would have to be doing the fighting in a war and I am sure no man who would command the troops would want them." National Service Board of Religious Objectors, *Congress Looks at the Conscientious Objector* 12 (1943).

In support of the above is the statement in Brahms, *They Step to a Different Drummer,* 47 Mil. L. Rev. 1, 18 (1970):

> "The writer's personal experience with in-service objectors and the clear behavior pattern manifested in the reported cases indicate that when the services force a sincere objector to continue in an active duty status, the usual, and perhaps expected, result is a recalcitrant soldier prone to disciplinary trouble. When the in-service objector is forced to choose between adhering to military law and being true to his beliefs, the latter alternative usually prevails. He, as a matter of course, commits violations of orders (albeit, usually from a sublime motive, but violations nevertheless). His presence is often disruptive of unit discipline. His productivity and usefulness as a member of the armed forces is significantly reduced

by virtue of his lack of motivation. Most, if not all, potential tasks which may be assigned violate his religious precepts, with the result that the objector will refuse to perform them. Therefore, it appears that according all sincere objectors freedom from continued personal military service might actually have a positive effect on military efficiency, morale and discipline." (Footnote omitted.)

If anything, these statements indicate that considerations of armed forces' morale should support a broad definition of conscientious objection to include objectors to the particular war then facing the registrants. To avoid disruption and adverse effects on morale, the military should avoid at all costs the induction of strong-willed and discriminating objectors to that war.

Chief Justice Stone noted, in his article on conscientious objection, during World War I:

"The presence of considerable numbers of these men in camps was a menace to the morale and discipline of the loyal enlisted men. They required the time and attention of competent officers whose services were needed in promoting our military operations. Any plan of action which would free the Army from the incubus of the conscientious objector, without as a consequence increasing his numbers, was of immense practical advantage to the military administration and was recognized as such by many of the most capable officers in the Army. Such unemotional military disciplinarians as the Romans found that discretion was the better part of valor in dealing with the religious scruples of the Jews; and such a rigid militarist as Napoleon found it convenient to assign the Mennonite conscripts to noncombatant service." Stone, *op. cit.* 270.

The same considerations mentioned by Chief Justice Stone apply when a selective conscientious objector is drafted into the army against his conscience.

C. *Disrespect for Law.*

In its report, *In Pursuit of Equity: Who Serves When Not All Serve,* the National Advisory Commission on Selective Service headed by Burke Marshall offered various reasons why the theory of selective conscientious objection should be rejected. It wrote (at p. 50):

> "First of all, the majority believes that the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others. Moreover, the question of 'classical Christian doctrine' on the subject of just and unjust wars is one which would be interpreted in different ways by different Christian denominations and therefore not a matter upon which the Commission could pass judgment.
>
> Secondly, the majority holds that so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.
>
> Third, in the majority view, legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction

is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax.

Fourth, the majority of the Commission was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing noncombatant service in support of a war which he had theoretically concluded to be unjust.

Finally, the majority felt that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the individual the necessity of making that distinction—which would be the practical effect of taking away the Government's obligation of making it for him—could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition. No such problem arises for the conscientious objector, even in uniform, who bases his moral stand on killing in all forms, simply because he is never trained for nor assigned to combat duty." [15]

[15] The overwhelming majority of distinguished writers, scholars and theologians who have considered the subject have strongly endorsed the wisdom of and advocated recognition of selective conscientious objection, and have vigorously criticized the reasoning and conclusions of the Marshall Commission majority. This is true of most of the contributors to the most recent book which has been published on this subject, Finn (ed.), *A Conflict of Loyalties* (1968). See particularly the essays by the late Father John Courtney Murray, one of the Marshall Commission minority; see, also, Quade, "Selective Conscientious Objection and Political Obligation," Finn, *supra*, at 195, 205-211; Harrington, "Politics, Morality and Selective Dissent," Finn, *supra*, at 219, 224-226; and Kaufman, "The Selective Service System: Actualities and Alternatives," Finn, *supra*, at 240, 244-254.

The previous section has referred to the last reason given. Furthermore it is difficult to see why only soldiers in combat can make a decision whether a war is just or not. There is no reason to think that civilians exposed to the multiplicity of news outlets reporting on every phase of any conflict cannot inform themselves and evaluate the ethical considerations leading to a conscientious objection to the war they are being drafted into. In addition, the whole point of a broader exemption rule is to insure that conscientious objectors of any kind are never put in the position that they could endanger their military unit.[16]

The fourth point noted above relates only to the specific proposal made by the minority on the commission and is not relevant here.

The other points will be dealt with in order:

(1) All killing under any circumstances.

The idea that conscientious objection requires an aversion to all killing at all times has never been the law. Courts have constantly recognized the validity of conscientious objector claims made by Jehovah's Witnesses who would fight in a war commanded by God, by pacifists who would engage in self-defense and by others who would defend their country if attacked. See discussion at pp. 24 ff. above. Furthermore to say that a man cannot obey a moral imperative to kill only under certain cir-

[16] It must also be noted that the Department of Defense has established a careful procedure for processing in-service claims of conscientious objection. See DOD Directive 1300.6. This program shows the military's own awareness of the problem of retaining conscientious objectors within its ranks.

cumstances is to deny one of the vital traditions of western religious thought, the "Just War" doctrine. It is certainly as sinful for a Just War Catholic to fight in an immoral war, as it is for a Quaker to bear arms. It is impossible to distinguish between the inner compulsions of the one and the other. For the Commission to discard the Just War doctrine as a "subject which would be interpreted in different ways by different Christian denominations" is to avoid the crucial question altogether. "It does not necessarily follow that because an admittedly religious doctrine is not uniform among sects it is therefore not religious." Macgill, *op. cit.*, 1374, n. 82.

(2) Political question.

This court's decision in *Welsh* makes clear that the second objection raised by the Marshall Commission is without foundation.

> "We certainly do not think that [Section] 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." 398 U.S. at 342.

So long as the political considerations are not the sole basis of the exemption, so long as the other tests of *Seeger* and *Welsh* are met, there is no problem about objection being only a political question. See Point IC above.

(3) Disrespect for law.

The conscientious objector exemption has a long tradition in America and constitutes a very specific relief from the operation of law. (As noted above, most of the early colonies required some form of alternate service or payment.) There has never been any similar tradition of exemption from taxes or other duties of citizenship. Thus there is no difficulty in "rounding out" the definition of conscientious objection to meet the moral requirements of another time and treating all such objectors in the same way.

In addition, this country has always recognized the difference between laws which do evil to oneself and those which require one to do evil to others. Lyman Beecher, the father of Harriet Beecher Stowe and the greatest theologian of his time, wrote one hundred years ago about the Fugitive Slave Law:

> "I may disapprove a law, I may think it unwise, injudicious, . . . and yet it may not require me to do anything positively wrong. I may submit to such a law, innocently, because I wrong nobody. But here is a law which commands me to sin positively and without apology. It commands me, when fully obeyed, to deny Christ, to renounce and abjure Christ's law, to trample under foot Christ's Spirit, and to remand Christ's flesh and blood into cruel bondage. . . .
>
> A law which does me some injury is one thing. A law which makes me do wrong is another. The first I may submit to while seeking its repeal. To the latter I must not give place by subjection, no, not for an hour. I must resist unto blood, striving against sin, i.e. to the patient shedding of my own blood. Hence, to disobey such a law does not disorganize society. It does

not unsettle law." Beecher, *The Duty of Disobedience to Wicked Laws* 12 (1851).

Similarly Chief Justice Stone noted:

"Viewed in its practical aspects, however, there may be and probably is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which the majority of his fellow citizens and the law regard as immoral or unwholesome to the life of the state on the one hand, and compelling him on the other to do affirmative acts which he regards as unconscientious and immoral. The action of the state in compelling the citizen to refrain from doing an act which he regards as moral and conscientious does not in most instances which are likely to occur do violence to his conscience; but conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong. The traditional view of the common law that right motives are no defense for crime and should not stay the hand of the law gives very little clue, therefore, to the sound method of dealing with the conscientious objector to war, in the realm of either morals or policy. However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience." Stone, *op. cit.* 268-69.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the judgment of the Court of Appeals be reversed and the cause remanded with directions to order dismissal of the indictment.

Respectfully submitted,

CONRAD J. LYNN
401 Broadway
New York, N.Y. 10006

LEON FRIEDMAN
42 West 44th St.
Room 500
New York, N.Y. 10036

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, N.Y. 10019

MELVIN L. WULF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N.Y. 10010

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1970

No. 85

GUY PORTER GILLETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

LEO ROSEN
Attorney for the
American Ethical Union,
Amicus Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
MICHAEL B. ROSEN

TABLE OF CONTENTS

	PAGE
The Interest of the American Ethical Union	1
Argument	
I—Section 6(j) of the Military Selective Service Act must be construed and applied so as to accord conscientious objector status to a registrant who otherwise qualifies under *Seeger* and *Welsh* but does not qualify as a total universal pacifist	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Sicurella v. United States, 348 U.S. 385 6

Taffs v. United States, 208 F.2d 329 (8th Cir.), *cert. denied,* 347 U.S. 928 6
Torcaso v. Watkins, 367 U.S. 488 ..... 2, 6

United States v. Gearey, 379 F.2d 915 (2d Cir.), *cert. denied,* 389 U.S. 959 6
United States v. Levy, 419 F.2d 360 (8th Cir.) 10
United States v. Seeger, 380 U.S. 163 ..... 2, 5, 6, 9, 10
United States v. Sisson, 297 F. Supp. 902, *appeal dismissed,* 399 U.S. 267 9

Washington Ethical Society v. District of Columbia, 249 F.2d 127 (D.C. Cir.) 2
Welsh v. United States, 398 U.S. 333 ..... 2, 5, 6, 10

PAGE

Constitution and Statutes:

United States Constitution:
Article I, Section 8 9
First Amendment 6, 9, 11
Fifth Amendment 6, 9, 11

Military Selective Service Act of 1967, §6(j), 50 U.S.C. App. 456(j) 5, 9, 10

Other Authorities:

American Ethical Union, *Do You Know the Ethical Movement?* 3

IN THE

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No. 85

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UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of the petitioner and the respondent.

The American Ethical Union is a federation of all the Ethical Culture Societies and Fellowships in the United

States which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement." The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of humanist groups and Ethical Culture Societies. In addition to its meetings and community activities, the Ethical Culture Movement has historically been involved in activities of social concern and was instrumental in the founding of the Settlement House movement in New York City, the Ethical Culture Schools, the Child Study Association, the Legal Aid Society and the Encampments for Citizenship.

Ethical Culture has been recognized by this Court as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins*, 367 U.S. 488, 495, n. 11 (1961); *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333, 347, n. 8 (1970) (Concurring opinion of Mr. Justice Harlan). See also *Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957). Ethical Culture has no fixed creed or dogma, and requires no particlar theological beliefs of its members.

> Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such questions.
>
> In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of

mankind. [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York, New York, p. 3]

The Ethical Movement does not rely upon the external authority of a theistic deity for the origins of man's moral obligations and duties towards mankind but instead places primary reliance upon man's conscience for the determination of moral judgments. The Ethical Movement holds that each man is morally responsible for his actions and that ultimately each man must accept the responsibility for his own actions in his relationship to others.

The issue in this case is a matter of serious concern to the American Ethical Union. Ethical Culture is founded on what is thought to be the ethical component of man—i.e., his conscience. Today the conscience of many, particularly the young, is deeply affected by the radical change in warfare of the atomic age. The generation now subject to the draft has lived its entire life in a world which may be annihilated at any moment. Many who might have volunteered in World Wars I or II might not be able conscientiously to participate at all in war where atomic weapons would be used or where weapons of mass and indiscriminate killing are used.

Some members of Ethical Culture Societies are today serving in the Armed Forces; others are affiliated with the Fellowship of Ethical Pacifists, which opposes participation in all wars, and some would object to participation in the Vietnam war but would not necessarily bar participation in all wars. This is consistent with a fundamental tenet of Ethical Culture that each individual is required to make his own moral and ethical decisions.

In his SSS Form 150, Gillette characterized his beliefs as religious and described them as follows:

> Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings is not dependent upon being a member of a specific Religious Sect or organization. (A.27)

Gillette's beliefs would thus appear to be nearly identical to those held by members of Ethical Culture Societies. Indeed, Gillette has himself so characterized them and acknowledged the impact on him of the Ethical Culture Movement:

> Fundamental questions of life: the infliction of pain, suffering or death on other people, is to me, against all principles of my Humanist belief. I believe that the development of ethical values should be a person's supreme aim in life. This belief is basic in the lives of many individuals and of the Society for Ethical Culture. (A.32)

ARGUMENT

I

Section 6(j) of the Military Selective Service Act must be construed and applied so as to accord conscientious objector status to a registrant who otherwise qualifies under *Seeger* and *Welsh* but does not qualify as a total universal pacifist.

We concur in and will not repeat the arguments set forth in petitioner's brief. As pointed out in that brief, Gillette's views are virtually identical to those involved in *Seeger* and *Welsh*. They are also virtually identical to those held by members of Ethical Culture Societies.

Gillette made his moral decision in accordance with an ethical imperative. His conscience clearly compelled him to risk imprisonment rather than become "a part of an instrument of war." Neither the sincerity nor the religious nature of his beliefs is questioned. Yet, the Court below found that Gillette did not qualify for conscientious objector status because of the Act's requirement of opposition "to participation in war in any form." Gillette's views, the Court said:

> "* * * were specifically directed against the war in Vietnam. His position seems to include a willingness to defend his homeland if it were attacked and to fight to enforce a United Nations decision against a country accused of breaking the peace."

In its decision (which was rendered, it should be noted, before this Court's decision in *Welsh*), the Court below stated that Gillette's beliefs were based on humanism and

it assumed for purposes of its decision that his views were "religious * * * as that word is construed to insure the constitutionality of the Act." We submit that such an assumption is compelled in any event by this Court's decisions in *Seeger*, *Welsh*, and *Torcaso*, *supra*.

Does the statutory requirement of opposition to "participation in war in any form" compel the drafting of men like Gillette, whose "consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war"? *Welsh* v. *United States*, 398 U.S. 333 (1970). We think not. We think that result would violate the First and Fifth Amendments to the Constitution. That result, we suggest, can be avoided if the statutory language referring to "participation in war in any form" is construed and applied, as we submit it should be, to mean participation in any form in the war for which the registrant is being conscripted.

"The test is not whether the registrant is opposed to all war, but whether he is opposed * * * to *participation* in war." *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). Thus the statute does not require opposition to every war or complete pacifism on the part of the individual. *Sicurella* v. *United States*, *supra*; *United States* v. *Gearey*, 379 F. 2d 915, 920 (2d Cir.) *cert. den.*, 389 U.S. 959 (1967); *Taffs* v. *United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. den.*, 347 U.S. 928 (1954).

The term "selective" objector is sometimes used as a pejorative for the objector who is said to "pick and

choose" the wars in which he wishes to serve. But this is an unrealistic characterization. When the moral objector "picks and chooses," he actually does no more than face a single specific situation and he applies his moral judgment to it. He does not in fact pick and choose between alternative possibilities all offered to him at the same time. Nor does he in fact "wish" to serve in a particular war; at most, he acquiesces in the dire necessity of doing so.

Moral and ethical objection to war is by its nature selective. The moral principle requires that the individual apply moral judgment to each situation as he finds it, on the basis of all the facts and circumstances. The Fraternity of Leaders* of the American Ethical Union in January 1967, adopted the following statement entitled "Support of War—A Moral Question":

> "* * * the Fraternity of Leaders of the American Ethical Union declares the question of individual participation in or support of war to be a moral question of the highest order, a question which cannot rightfully be ignored. When any person is called upon to support a war effort, he should listen to the leaders of his government, seek out the most objective available news sources and then make a moral decision in the light of his own ethical values and his responsibility to the world community as well as to his own nation. The fact that his government offers him a ready-made

* The Leaders of the Ethical Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

moral position in no way absolves him from the responsibility for making his own decision.

If he concludes that his government is morally and legally right, he should give it his wholehearted support. If he concludes that his government is wrong, he should oppose its policy with equal vigor. When an individual who is liable for military service concludes that a war is wrong, he has not only the moral right but the moral responsibility to announce himself as a conscientious objector. What is ethically imperative for persons of all ages is that they make a moral decision."

As pointed out in petitioner's brief (at p. 50 et seq.), the Catholic Church, many Protestant faiths and Judaism similarly require that the individual determine for himself in each separate instance whether a war is just or unjust and whether, morally, he can or cannot support or participate in it.

An interesting light on this issue is the fact that many an avowed total pacifist claiming irrevocable opposition to participation in any war at any time has subsequently discovered that his moral judgment with respect to a particular war, notably World War II, required that he serve in it. This suggests that for many if not all total pacifists it is in reality the morality of the specific situation of the particular war on which their ultimate conviction is grounded.

We submit that the statute may not be interpreted to distinguish between those religions or beliefs which compel non-participation in all wars and those which compel non-participation in a particular war. If so construed and ap-

plied, the statute would, we submit, violate the First and Fifth Amendments.

In its brief to this Court last Term in *United States* v. *Sisson*, 297 F. Supp. 902 (1969), *appeal dismissed*, 399 U.S. 267 (1970), the Government conceded that the power of Congress granted by Article I, Section 8 of the Constitution to raise and maintain armies is limited by the Bill of Rights and that Congress, in conscripting persons for military service, may neither "invidiously discriminate against any class or person" (Brief for the United States at 40) nor "act in a way which deprives a person of religious freedom or establishes a religion in violation of the First Amendment" (*ibid.* at 43).

Yet the decision of the Court below purports to grant Congress just such power. Its interpretation of Section 6(j) discriminates between those religions and beliefs which compel non-participation in all wars and those which compel non-participation in a particular war. *Amicus* contends that the Court of Appeals' interpretation of the Statute violates the First and Fifth Amendments because (a) it invidiously discriminates between religions and beliefs, (b) it interferes with the free exercise of religious beliefs, and (c) it establishes a preference for some religions or beliefs over others.

The Court below based its decision in part on the finding that Gillette's beliefs were a "moral code", opposed to "a particular employment of the armed services". This finding is contrary to the finding in *Seeger*, *supra* at 186, that

> "The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code

which is not only personal but which is the sole basis for the registrant's belief."

This Court stated in *Welsh, supra*, at 343:

> "Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a 'religious' conscientious objector, it follows that his views cannot be 'essentially political, sociological or philosophical.' Nor can they be a 'merely personal moral code.' See *United States* v. *Seeger*, 380 U.S., at 186."

The Eighth Circuit in its unanimous decision in *United States* v. *Levy*, 419 F.2d 360 (1969) at 367, stated

> "* * * *Seeger* almost eliminated the 'personal moral code' exception by restricting it to those situations in which it is 'the sole basis for the registrant's belief.' * * * At any rate the Government admits in its brief that 'a moral code must be devoid of religious belief'" (at 368).

The judgment of the Court of Appeals should therefore be reversed.

Conclusion

For the reasons set forth above and in petitioner's brief, we submit that the Military Selective Service Act of 1967 should be so construed and applied as to include petitioner's conscientious opposition to participation in war; that unless the statute is so construed and applied, it is (a) an unconstitutional discrimination against adherents of some religions and persuasions, including many members of Ethical Culture Societies, in violation of both the Es-

tablishment and Free Exercise clauses of the First Amendment, and (b) an arbitrary, unreasonable, and invidious classification in violation of the Fifth Amendment.

Respectfully submitted,

Leo Rosen
Attorney for the
American Ethical Union,
Amicus Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
Greenbaum, Wolff & Ernst
Michael B. Rosen

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Summary of Argument	10
Argument:	
I. Selective conscientious objectors do not meet the statutory qualifications for exemption or discharge from service	13
II. A selective conscientious objector has no constitutional right to exemption from combatant service in Vietnam	22
Conclusion	35

CITATIONS

Cases:	
Abington School District v. *Schempp*, 374 U.S. 203	24, 28, 29
Cantwell v. *Connecticut*, 310 U.S. 296	22
Carafas v. *LaVallee*, 391 U.S. 234	9
Clay v. *United States*, 397 F. 2d 901 vacated and remanded *sub nom. Giordano* v. *United States*, 394 U.S. 310	18
Clark v. *Gabriel*, 393 U.S. 256	28
Estep v. *United States*, 327 U.S. 114	28
Falbo v. *United States*, 320 U.S. 549	28
Fleming v. *United States*, 344 F. 2d 912	21
Girouard v. *United States*, 328 U.S. 61	19
Hamilton v. *Regents*, 293 U.S. 245	17, 23, 29
Jacobson v. *Massachusetts*, 197 U.S. 11, 29	22
Lichter v. *United States*, 334 U.S. 742	22
McGowen v. *Maryland*, 366 U.S. 420	29
Miller v. *Laird*, No. C–70328, AJZ N. D. Calif., decided April 28, 1970	20, 21
Oestereich v. *Selective Service Board*, 393 U.S. 233	28

408-437—70——1

Cases—Continued

Page

Prince v. *Massachusetts*, 321 U.S. 158 22
Selective Draft Law Cases, 245 U.S. 366 22
Sherbert v. *Verner*, 374 U.S. 398 32
Sibron v. *New York*, 392 U.S. 40 9
Sicurella v. *United States*, 348 U.S. 385 ..... 18, 20, 25
Sommers, In re, 325 U.S. 561 22–23
Taffs v. *United States*, 208 F. 2d 329, certiorari denied, 347 U.S. 928 19
United States v. *Bowen*, Cr. No. 42499, N.D. Calif., decided December 24, 1969 21
United States v. *Carroll*, 398 F. 2d 651 20
United States v. *Curry*, 410 F. 2d 1297 18
United States v. *Haughton*, 413 F. 2d 736 20
United States v. *Henderson*, 180 F. 2d 711 31
United States v. *James*, 417 F. 2d 826 20
United States v. *Kauten*, 133 F. 2d 703 ..... 18, 25
United States v. *McFadden*, 309 F. Supp. 502 ..... 21, 31
United States v. *MacIntosh*, 283 U.S. 605 ..... 19, 20, 23
United States v. *O'Brien*, 391 U.S. 367 22
United States v. *Owen*, 415 F. 2d 383 ..... 20, 21
United States v. *Purvis*, 403 F. 2d 555 20
United States v. *Reeb*, No. 25, 759 (C.A.9), decided October 27, 1970 18
United States v. *Seeger*, 380 U.S. 163 ..... 15, 21
United States v. *Sisson*, 297 F. Supp. 902 21
United States v. *Spiro*, 384 F. 2d 159, certiorari denied, 390 U.S. 956 18
Walz v. *Tax Commission*, 397 U.S. 664 ..... 24, 29
Welsh v. *United States*, 398 U.S. 333 ..... 15, 19, 23, 24, 29, 33
Witmer v. *United States*, 348 U.S. 375 19

Constitution, statutes and regulations:

Selective Service Act of 1948, 62 Stat. 612 18
Nationality Act of 1940, 54 Stat. 1157 19

Constitution of the United States:

Art. I, Sec. 8 22
First Amendment 2, 22, 24, 27
Establishment Clause 11
Free Exercise Clause 11, 12, 31, 33
Fifth Amendment 2, 12, 22, 33
50 U.S.C. App. (Supp. V, 456(j), § (j) 2, 5, 10, 12, 14, 16, 18, 22

Constitution of the United States—Continued Page
50 U.S.C. App. (Supp. V) 462 3
Air Force Regulation AFR 35–24 (March 25, 1969) .. 14
Army Regulation AR 635–20 (January 1, 1970), AR 135.25 (June 1, 1969) 14
Coast Guard COMDTINST 1900.2 (October 7, 1968) . 14
Department of Defense Directive, 1300.6 (May 10, 1968) 5, 13, 14
Marine Corps. Order MCO 1360.16B (June 18, 1969) . 14
Navy Department BUPERINST 1900–5 (July 18, 1968) 14
Miscellaneous:
55 Cong. Rec. 1474, 1476, 1478 16
Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969) 32–33
Comment, 34 U. Chi. L. Rev. 79 (1966) 25, 26
Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355 (1968) .. 24
Pope John XXIII, *Pacem in Terris* (April 11, 1963) .. 30
Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve* (1967) 34–35
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Selective Service System Monograph No. 11, *Conscientious Objection* (1950) 15
Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. of Pitt. L. Rev. 695 (1958) 28

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

No 325

LOUIS A. NEGRE, PETITIONER

v.

STANLEY R. LARSEN, COMMANDING GENERAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the court of appeals in No. 85 is reported at 420 F. 2d 298; the decision of the court of appeals in No. 325 is reported at 418 F. 2d 908. The decisions of the district courts are unreported.

JURISDICTION

The judgment of the court of appeals in No. 85 was entered on January 9, 1970, and the petition for a writ of certiorari was filed on February 11, 1970. The judgment of the court of appeals in No. 325 was entered on November 6, 1969, and the petition for a writ of certiorari was filed on February 5, 1970. Both petitions were granted on June 29, 1970. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Military Selective Service Act, and the corresponding military regulations, provide exemptions from combatant or other military service for "selective" conscientious objectors, whose scruples relate only to a particular conflict and not to war in any form.

2. Whether the legislative judgment not to excuse "selective" conscientious objectors violates the principles of religious neutrality and equal protection underlying the First and Fifth Amendments.

STATUTE INVOLVED

50 U.S.C. App. (Supp. V) 456(j), § 6(j), provides:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form * * * Any person claiming exemption from combatant training and service because

of such conscientious objections * * * shall, if he is inducted into the armed forces * * * be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered * * * to perform * * * civilian work contributing to the maintenance of the national health, safety, or interest * * *.

STATEMENT

No. 85

After a jury trial in the United States District Court for the Southern District of New York, petitioner Gillette was convicted of having wilfully refused to report for induction as ordered, in violation of 50 U.S.C. App. (Supp. V) 462. He was sentenced to two years' imprisonment.

Gillette originally registered with his local board in Yonkers, New York on March 4, 1964. After working as a photographer's assistant for one year, he became a full-time student at the Neighborhood Playhouse School of the Theatre in New York City, studying for two years to become an actor.

On April 29, 1967, petitioner wrote his local board to request SSS Form 150, the special application form for conscientious objectors. He stated (G. App. 23) that he was requesting an exemption because "I believe that the United States Government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice."

Alluding to "the Treaty of London of 1945 (Nuremberg Charter) which outlaws the 'waging of a war of aggression,' " he stated that "I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically 'Humanism'" (*ibid.*).[***] Subsequently, in response to the question in Form 150 as to the circumstances under which he believed in use of force, petitioner wrote as follows (G. App. 26).

> For the personal protection of self and other individual persons.
>
> To enforce a decision by a majority of the United Nations, against a country accused of breaking the peace, or the direct defense of my country.

A supporting letter from a clergyman indicated that petitioner's beliefs were "primarily related to the war efforts in which our country is now engaged" (G. App. 33), and that he was sincere in those beliefs (*ibid*). Another supporting letter noted that there was "absolutely no doubt in [the writer's] mind that [petitioner] loves his country and that he would defend it." (G. App. 38). At a personal appearance granted by the local board, petitioner stated, according to the minutes, that "his conscience would not let him fight in Vietnam" and that "he could not honestly say he would not defend his country if it were attacked" (G. App. 44).

The local board concluded that Gillette was "opposed to military service in the case of the Vietnam

War" (*ibid.*), and the district court found a "basis in fact for the board concluding that whatever moral views were held they were directed to the Vietnam war * * * (G. App. 13). In affirming the conviction for failure to report, the court of appeals, *per curiam*, concluded that the "[e]vidence derived from Gillette's selective service file and from his testimony before [District] Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam." (G. App. 20).

The court of appeals held that petitioner's selective objection did not qualify him for conscientious objector status since, "[e]ven assuming that his views were 'religious' as that word is construed to insure the constitutionality of the Act, the Act requires opposition 'to participation in war in any form'." (G. App. 21).

No. 325

Petitioner Negre was inducted into the Army in August 1967. In February 1968, after receiving his basic training, he was ordered to duty in Vietnam. He then filed an application for discharge as a conscientious objector pursuant to Department of Defense Directive 1300.6 and implementing Army regulations.[1] The application was denied, as was his petition in the district court for a writ of habeas corpus.

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[1] These regulations prescribe the same standards for determining conscientious objector status as those applied by the Selective Service System pursuant to 50 U.S.C. App. (Supp. V) 456(j) (see *infra* pp. 13–14).

Petitioner, a Catholic, based his application on the basic principle, stated by a Catholic chaplain, that "[e]ach Catholic must form his own conscience in respect of military service. Thus, one Catholic may serve in good conscience, while another Catholic will find that his conscience prohibits military service. Under Catholic religious training and belief, each Catholic has a duty to follow his own conscience in respect of military service" (N. App. 4). His application adopted portions of the Pastoral Constitution of the Church in the Modern World (December 7, 1965)[2] (N. App. 8–9), as follows:

> (Sec. 79) But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. * * *
>
> (Sec. 80) The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. * * *
>
> * * * * * *
>
> Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. * * *

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[2] Petitioner stated that he accepted "the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience * * *" (N. App. 10).

The application went on to state that, prior to his induction, petitioner had his "own convictions about the war in Vietnam," but determined that "before making any decision or taking any type of stand on the issue [he] would permit [himself] to see and understand the Army's explanation of its reasons for violence in Vietnam (N. App. 11). Upon completion of his infantry training, he concluded that any contribution to the war in Vietnam would violate his "own concepts of natural law," would "[go] against all that [he] had been taught in [his] religious training," and would be "in contravention of [his] own conscience and [his] moral beliefs" (N. App. 11–12). The application further stated (N. App. 12):

> I cannot personally believe that by being in Vietnam we are helping the people there as we say. Have you ever stopped to think all the harm we have brought to that country? We, as being there, are not only destroying their homes, but also are taking the lives of people who were brought up on the very soil who are fighting to preserve their beliefs. We are depriving the individual of the right to live, if we feel he or she is a threat to a village. In Vietnam the individual soldier has the power to kill anyone whom he thinks is wrong.

The application expressed the view that petitioner's duty in the Fort Ord (California) Hospital did not constitute "a direct participation in the war in Vietnam" (N. App. 13) but that petitioner would "refuse duty as a clerk or medical corpsman in Vietnam as [he] would refuse infantry combat duty in Vietnam" (*ibid.*).

He would, however, still be "prepared to perform noncombatant hospital service in the United States because such service is not directly in aid of the Army forces in Vietnam" (N. App. 14). At the end of his application, petitioner added, without any elaboration, that at present he "could not conceive participation in any war." (N. App. 14).

Petitioner was afforded the opportunity to express his beliefs orally at a hearing. The hearing officer found that he was an extremely devout Catholic who sincerely believed that the Vietnam war was wrong (N. App. 38). The officer directed particular attention to petitioner's statements of his conclusions as to the United States' role in Vietnam (*id.* at 38–39):

> [Petitioner] is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some "types" of war.
>
> * * * * *
>
> PFC Negre is of the belief that the Vietnam war is immoral and indiscriminate. He adopts the conclusions of Pope Paul VI [in the pastoral Constitution, relevant portions of which are set out *supra*, p. 6], but makes his own judgment as to what is indiscriminate and what is aggression.[3]

The hearing officer thus recommended that the application for discharge be rejected (N. App. 39) because

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[3] The hearing officer further noted that Negre "stated that he would serve in the United States in a noncombatant status if the United States was attacked. He would not carry a weapon, but he would assist in some other capacity as long as his support was indirect (N. App. 39).

in his opinion "the applicant is objecting to a particular war" (N. App. 39).

The Department of the Army rejected the application for discharge, finding (N. App. 41) that:

> Applicant's objection to service [is] based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection.

Negre then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California.[1] The court denied relief after finding a basis in fact to support the Army's conclusions. The court of appeals affirmed, holding that "[b]eyond question, there was a basis in fact" (N. App. 51) for the conclusions of the Department of the Army. It pointed out (*ibid.*):

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[1] Petitioner Negre is no longer on active duty in the Army, having been transferred to Ready Reserve status. By his own statements, his conscientious views allow him to serve in the military so long as he need not serve in Vietnam, and it was only because he faced Vietnam duty that he sought discharge. His present reserve duty is not in conflict with his expressed views; the possibility that he would ever be reactivated and ordered to Vietnam is highly remote. Under the circumstances, if petitioner were now to file a petition for habeas corpus, for the first time, the matter would lack the ripeness it had when habeas corpus was sought and the petition for a writ of certiorari was filed in this Court. However, as we read *Sibron* v. *New York*, 392 U.S. 40, and *Carafas* v. *LaVallee*, 391 U.S. 234, the continuing remote contingency of Vietnam service may prevent the matter from now being considered moot under the circumstances of this case.

> [Petitioner] objects to the war in Vietnam, not to all wars. * * * He does not express an objection to the nation's military activities in Korea, Japan, West Germany and other parts of the world. Nor does he object to what he terms non-combatant duty in the Army in the United States. Clearly, his views are completely inconsistent with an objection to "war in any form." * * *

SUMMARY OF ARGUMENT

I

Section 6(j) of the Military Selective Service Act of 1967 exempts from combatant training and service those persons who by reason of religious training and belief are opposed to war in any form. This provision has been incorporated in regulations promulgated by the various Armed Services to benefit the in-service conscientious objector to all wars who seeks discharge from the military.

The historical evolution of the statutory exemption reflects a clear congressional intent to accommodate only those persons who consider any and all wars as contrary to the principles of their religion—whatever form that religion may take. It was not intended to reach, and has never been construed so broadly as to reach, the individual who conscientiously opposes the particular war of the moment, no matter how sincere his objection or religious his motivation.

II

Exemption from military service is not required by the Constitution but is solely a matter of legisla-

tive grace. Congress, in drawing the line between conscientious objectors to all wars and the "selective" objector to a particular war, recognized that the two objections were by nature qualitatively different. It is one thing to frame legislation so as to accommodate individuals whose beliefs, based in religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. Compelling reasons of general policy support Congress' decision not to follow the latter course. Neither the purpose nor the effect of the legislation runs counter to the constitutional requirements of the Establishment Clause of the First Amendment.

Nor can it reasonably be maintained that, in deciding to require military service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. However untrammeled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. There are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government. But that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Such is the

case here. Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require exemption of those who, on the basis of some religious motivation, hold a "selective" conscientious objection to participation in a particular war. And so to construe that provision would logically lead to a situation destructive of orderly government, since it would of necessity extend beyond the Selective Service context and reach other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed.

Plainly, Congress acted within the permissible range of legislative judgment in drawing the line in Section 6(j) on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend upon social or political considerations. The classification involved is not irrational, arbitrary or capricious in violation of the equal protection concepts of the Fifth Amendment. While Congress could, of course, determine to draw the line elsewhere, that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.

ARGUMENT

I. SELECTIVE CONSCIENTIOUS OBJECTORS DO NOT MEET THE STATUTORY QUALIFICATIONS FOR EXEMPTION OR DISCHARGE FROM SERVICE

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 456(j)) exempts from "combatant training and service in the armed forces" any person found by his local board to be "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form." Such persons remain subject to the draft but are assigned to noncombatant service, or, if their religious beliefs require, to forms of civilian service outside the armed forces. 50 U.S.C. App. (Supp. V) 456(j)).[5]

While this provision has direct application only to claims asserted prior to induction, post-induction claims of conscientious objection to war in any form are provided for in Department of Defense Directive No. 1300.6 (May 10, 1968), which declares:

> IV A. *National Policy* * * * [t]he Congress * * * has deemed it more essential to

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[5] Both petitioners in these cases assert, by the nature of their claims (refusal of induction by Gillette, request for discharge by Negre), that their selective conscientious objections entitle them to complete freedom from military service. Gillette's statements in support of his claim to the local board were consistent with such a position (see pp. 3–4, *supra*); Negre's supporting statements may be read as consistent only with a claim for noncombatant service while remaining in the military (see pp. 6–8, *supra*). In our argument we do not distinguish between claims to total exemption and claims for noncombatant (I–A–O) military service, since we believe that a selective objector does not have the kind of conscientious scruples that are prerequisite to either claim.

408–437—70——3

> respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (I–0 classification) shall not be inducted into the Armed Forces * * *
>
> IV B. *DOD Policy.* Consistent with this national policy, bona fide conscientious objection * * * by persons who are members of the armed forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized.

Pursuant to this mandate, the various branches of the Armed Services have promulgated regulations applicable to in-service objectors which incorporate the statutory exemption of Section 6(j) and the attendant decisional law construing it.[6] In essence, then, it is the construction and validity of Section 6(j) that is at issue in both of the present cases—directly in *Gillette* and by incorporation in *Negre*.

Once again this Court is called upon to examine the legislative history of the exemption provision, this time to ascertain whether Congress intended it to

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[6] DOD Directive No. 1300.6 further states that, "[s]ince it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining I–0 or I–A–O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service." See Army Regulations AR 635–20 (January 1, 1970) and AR 135.25 (June 1, 1969); Navy Department BUPERINST 1900–5 (July 18, 1968); Air Force Regulation AFR 35–24 (March 25, 1969); Marine Corps Order MCO 1306.16B (June 18, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

have application to those conscientiously opposed to participation in only the particular conflict of the moment, or, instead, envisaged its coverage as limited to persons whose "religious" conscientious objection,[7] extends to participation in all wars in any form. The historical evolution of Section 6(j) was traced in detail in the government's brief in *United States* v. *Seeger,* No. 50, O.T. 1964, pp. 41–60, reprinted in the government's Supplement to its brief in *Welsh* v. *United States,* No. 76, O.T. 1969, pp. 26A–45A, and we do not repeat it here.[8] It suffices to point out that from the early days of our republic to the present time, the legislative purpose, as stated in a resolution of the Continental Congress in 1775, has been to honor the consciences of those "who from Religious Principles cannot bear Arms in any case." *Selective Service System Monograph* No. 11, *Conscientious Objection* (1950), pp. 33–34. Never, in all the years in

[7] We do not view the decisions of this Court in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333, as reading out of the statute the requirement that a conscientious objection to war must be founded on "religious training and belief." As we read those opinions, while one's beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" (398 U.S. at 339), they still must be "religious" in the registrant's "own scheme of things" (380 U.S. at 185; 398 U.S. at 339). Thus, they must occupy "'a place parallel to that filled by * * * God' in traditionally religious persons" and "function as a religion in [the registrant's] life" (380 U.S. at 185; 398 U.S. at 340). It is thus not enough if one's conscientious objection "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 340–341).

[8] Counsel for both petitioners have been furnished copies of our *Seeger* brief and our *Welsh* supplemental brief.

which Congress has recognized conscientious objection as a basis for exemption from military service has it extended the privilege to persons other than those who were total pacifists—that is, opposed to all forms of war.[9]

In this regard, the language of the present statute is unambiguous. It requires in specific terms a religious conscientious objection to "participation in war in any form." Petitioners urge that the phrase "in any form" be construed to modify the word "participation" and not the word "war." Had Congress so intended, however, provision in the same section for possible induction and assignment to "noncombatant service" of persons found to be conscientious objectors would have had little meaning, for such persons, under petitioners' reading of the statute, would be exempt by definition from any form— combatant or noncombatant—of participation. Moreover, even without regard to the modifying phrase, the meaning of Section 6(j) remains plain, since the term "war" is used in its generic sense, only those who object to "participation in war" are covered. No shuffling of words can alter the thrust of the Act—[illegible]

[9] We note that while the World War I Act was under consideration, the Senate rejected an amendment which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war" 55 Cong. Rec. 1474, 1478. Senator LaFollette, the principal proponent of the bill admitted that the intent and effect of his proposal was to excuse those persons of German and Austrian ancestry who had "conscientious objections" against going "into the service to fight against their own kith and kin * * *." *Id.* at 1476.

having application only to those conscientiously opposed to war generally, in the historical sense of having a religious objection to the concept of bearing arms under any circumstances (see our *Welsh* supplement, *supra*, pp. 26A–34A).[10]

To construe this provision, as petitioners necessarily urge, as an exemption from *all* combatant training for conscientious objectors not unwilling to bear arms generally but opposed to doing so with respect to a particular conflict, stretches the congressional language beyond its breaking point.[11] Ample support for this

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[10] In the article by then Dean Stone, *The Conscientious Objector*, 21 Columbia Univ. Q. 253, on which petitioners seem to place considerable reliance, the frame of reference was not the "selective" objector (*id.* at 267). During World War I, the exemption not only had no application to selective objectors, but, indeed, was limited in its coverage to members of historic peace churches. See also the concurring opinion of Mr. Justice Cardozo, joined by Justices Stone and Brandeis, in *Hamilton v. Regents*, 293 U.S. 245, 265, 266–267.

[11] Petitioner Gillette argues that "[s]ince individuals like Gillette are not being faced with an invasion of the United States or a United Nations sanctioned war or World War II, the fact that their consciences would allow them to fight in these wars should not be sufficient to deny them conscientious objector status with respect to the war they are being faced with, namely the Vietnam War" (Gillette Brief p. 10). However, a person entering military service today is not necessarily "faced with" the Vietnam war. His duty of service potentially may be needed in other places during any given term of service. Thus, the broader inquiry as to a person's feelings about all wars is pertinent and necessary in practical terms, as well as being mandated by the fact that Congress did not intend that a "selective" objector be exempt from combatant or noncombatant training generally because he is opposed to a particular war.

conclusion is found in judicial precedent. With reference to identical language in the Selective Training and Service Act of 1940 (54 Stat. 889), Judge Augustus Hand insisted that a belief sufficient to qualify for conscientious objector status "must *ex vi termini* be a general scruple 'against participation in war in any form' and not merely an objection to participation in the particular war." *United States* v. *Kauten*, 133 F. 2d 703, 707 (C.A. 2). The interpretation was followed under the Selective Service Act of 1948 (62 Stat. 612), which insofar as here pertinent remained unchanged. *United States* v. *Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956; *Clay* v. *United States*, 397 F. 2d 901, 919 (C.A. 5), vacated and remanded on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310. And it has been applied with equal force to the present statute. See *United States* v. *Curry*, 410 F. 2d 1297, 1299 (C.A. 1); *United States* v. *Reeb*, No. 25, 759 (C.A. 9), decided October 27, 1970; and the decisions of the Second and Ninth Circuits in the instant cases.

Moreover, a similar understanding of the scope of Section 6(j) appears from *Sicurella* v. *United States*, 348 U.S. 385, which gave this Court the only occasion it has previously had to pass directly on the meaning of "participation in war in any form." There, the Court concluded that a Jehovah's Witness, who conscientiously opposed participation in all secular wars but admitted to being able to fight in a possible "theocratic war" waged at the command of Jehovah "without carnal weapons" (348 U.S. at 390–391), was entitled to the exemption because (*id.* at 391):

> * * * Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets.

As to this "type" of war, it is implicit in the Court's language that a conscientious objection, on religious grounds, must under the terms of the statute be absolute.[12] See also *Taffs* v. *Unied States,* 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928. Indeed, as recently as last term in *Welsh* v. *United States,* 398 U.S. 333, this Court, despite differences on other aspects of the challenged provision, was unanimous in expressing the issue under Section 6(j) as opposition to "participating in any war at any time." 398 U.S. at 340, 342; *id.* at 347, 357 (Harlan, J., concurring); *id.* at 369–370 (White, Burger and Stewart, JJ., dissenting). Cf. *Witmer* v. *United States,* 348 U.S. 375, 381.

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[12] Chief Justice Hughes, dissenting in *United States* v. *MacIntosh,* 283 U.S. 605, 627, expressed the opinion (*id.* at 635) that an alien conscientiously opposed on religious grounds to bearing arms, either generally or selectively, should not be denied citizenship or the right to hold public office where he is unable for that reason alone to take the oath (Nationality Act of 1940, 54 Stat. 1157) to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." *Id.* at 630. The rationale, later adopted by the majority of the Court in *Girouard* v. *United States,* 328 U.S. 61, 64, was simply that "[t]he oath required of aliens does not in terms require that they promise to bear arms," and thus the "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions." Though petitioners take comfort in the fact that Chief Justice Hughes did not in

No case relied on by petitioners has interpreted the *statute* otherwise, nor are we aware of any judicial decision which reads into the questioned language an exception for "selective" conscientious objectors. Most of those said to contain dictum suggesting such a construction represent nothing more than a reaffirmation of the *Sicurella* rationale [13] (*United States* v. *Haughton*, 413 F. 2d 736, 742 (C.A. 9); *United States* v. *Purvis*, 403 F. 2d 555 (C.A. 2)) or a variant of the settled principle that a willingness to use force in self-defense or in defense of one's home and family is not inconsistent with a conscientious objector claim. *United States* v. *James*, 417 F. 2d 826, 831 (C.A. 4); *United States* v. *Carroll*, 398 F. 2d 651, 655 (C.A. 3); and see *Sicurella* v. *United States*, *supra*, 348 U.S. at 389. Even the few cases granting an exemption despite the objector's acknowledgment that "it was possible" he would fight if the country was invaded (*United States* v. *Owen*, 415 F. 2d 383, 390 (C.A. 8); *Miller* v. *Laird*, No. C–70328, AJZ, N.D. Calif., decided April 28, 1970) were careful to emphasize that since the

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MacIntosh distinguish between total pacifists and "selective" religious objectors in concluding that alien conscientious objectors can qualify for citizenship and for public office (*id.* at 635), that has little bearing on the present case. There the question was whether a person unwilling to bear arms in what he considered to be an "unjust" war could, *under the language of the loyalty oath*, still qualify for citizenship or public office; it was not whether such persons could also qualify for an exemption from "combatant training and service" under statutory language requiring a religious conscientious objection to "participation in war in any form." As to the latter, Chief Justice Hughes was careful to express no opinion.

[13] See cases cited at p. 27, n. 4 of petitioner Gillette's brief.

claimant was *then* conscientiously "opposed to participation in all war," his claim should not be denied because of a statement which "relates to a contingency and provides no inference to [his] state of mind when the incident occurred." " 415 F. 2d at 390; and see *Miller* v. *Laird, supra.*

On this background, the relevant language of Section 6(j) (and hence of the military regulations governing Negre's request for discharge) lends itself to but one interpretation—that exempt status depends on a "religious" conscientious objection to participation in any shooting war in any form. Since Congress has determined so to circumscribe the exemption, it remains only for this Court to ascertain whether that legislative judgment runs afoul of some constitutional command. Notwithstanding recent district court decisions to the contrary (*United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass.), appeal dismissed for lack of jurisdiction, 399 U.S. 267; *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Cal.), pending on jurisdictional statement, No. 422, this Term, *United States* v. *Bowen*, Cr. No. 42499, N.D. Cal., decided December 24, 1969), we submit that it does not.

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[11] In *Fleming* v. *United States*, 344 F. 2d 912 (C.A. 10), while the registrant apparently possessed what could be characterized as "selective" views, the court considered him "to be conscientiously opposed to participation in war in any form" (*id.* at 916) and thus did not focus on this aspect of the case. Rather, the issue turned on whether Fleming's opposition was motivated "by reason of religious training and belief" within the meaning of *Seeger*.

II. A SELECTIVE CONSCIENTIOUS OBJECTOR HAS NO CONSTITUTIONAL RIGHT TO EXEMPTION FROM COMBATANT SERVICE IN VIETNAM

Under the Constitution, the authority to determine whether or not this country needs a particular individual's services in the Armed Forces is vested in the Congress. See *United States* v. *O'Brien,* 391 U.S. 367, 377; *Lichter* v. *United States,* 334 U.S. 742, 755-758. In exercising its broad grant of power "[t]o raise and support Armies" (Art. I, Sec. 8), Congress may lawfully conscript for military service either in time of peace or war. *United States* v. *O'Brien,* 391 U.S. 367, 377; *Selective Draft Law Cases,* 245 U.S. 366. To be sure, Congress may not act in a way which impairs religious freedom or establishes a religion in violation of the First Amendment; nor may it arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. But Congress has done neither in limiting the scope of Section 6(j) to those opposed to war "in any form".

Religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303; *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29; *Prince* v. *Massachusetts,* 321 U.S. 158. And, as we shall show, neither the principles of religious neutrality, nor those of equal protection more generally, invalidate the congressional decision to excuse only those who are opposed to participation in war in any form (50 U.S.C. App. (Supp. V) 456(j)). Because the Constitution requires no exemption at all (*In re*

Sommers, 325 U.S. 561),[15] it is apparent, as expressly noted by this Court in *Hamilton* v. *Regents*, 293 U.S. 245, 264, quoting with approval from *United States* v. *MacIntosh*, 283 U.S. 605, 623–624, that:

> The conscientious objector is relieved from the obligation to bear arms * * * only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. * * * [T]he war powers * * * include * * * the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general.* * *

A

In granting the exemption only to those opposed to war generally, Congress sought to accommodate, rather than to establish, religion. It chose to recognize that group of persons who for reasons of conscience reject killing as an instrument of national policy for all situations, and, in deference to their religious beliefs, to spare them the hardship that would result if they were required to perfom military service. The scope of Section 6(j) was as recently as last term, in *Welsh* v. *United States*, 398 U.S.

[15] As Mr. Justice Harlan stated in his separate opinion in *Welsh* v. *United States*, *supra*, 398 U.S. at 356, "Congress, of course, could entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."

333, construed by this Court in just such a way as to meet the "'benevolent neutrality'' standard of the First Amendment (*Walz* v. *Tax Commission*, 397 U.S. 664, 669). As a consequence, all persons who are in a broad sense "religiously" opposed to war in any form are entitled to the exemption, whether their views be a matter of church doctrine, nontheistic religious teaching or individual conscience independently developed. No religion is favored; none is discriminated against; none is established.

That Congress drew the line between the conscientious objector to all wars and the "selective" objector to a particular war in no way suggests a religious preference. The underlying purpose of the legislative decision, to which we must look (*Abington School District* v. *Schempp*, 374 U.S. 203, 222), is to recognize a qualitative difference between general and selective objection without regard to religion.[16] Opposition to a particular war necessarily involves a political judgment,[17] an individual conclusion that the policy

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[16] Since Congress has chosen to make no distinction between religious and non-religious "selective" conscientious objectors, denying exemption to both, it has avoided the question that would arise under the Establishment Clause if Section 6(j) were read to include "religious" selective objectors, but did not include non-religious selective objectors. See *Welsh* v. *United States*, *supra*, 398 U.S. at 356–361 (Harlan, J., concurring). That problem is, however, suggested by Negre's Brief in No. 325, insofar as it argues that he is entitled to special treatment on account of a Catholic "unjust war" precept.

[17] See generally, Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L. Rev. 1355, 1374–1376 (1968).

adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. See *United States* v. *Kauten, supra,* 133 F. 2d at 707. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular. See generally, Comment, 34 U. Chi. L. Rev. 79, 102 (1966).[18] In contrast, those who conscientiously oppose participation in combat in any form do not invoke the same type of contemporary political judgment. Their actions are not motivated by weighing the objectives of a governmental decision to wage war, nor by determining independently whether a war is just or unjust, the enemy good or bad. Their rejection of war in any form is on a different level; it is based, rather, on inherent general characteristics of military combat, on the cardinal moral tenet that it is wrong to kill for any purpose at any time.[19]

It is one thing to frame legislation so as to accommodate individuals whose beliefs, based on religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal

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[18] Thus, for example, Negre's objection to the Vietnam war, though said to be derived from religious doctrine, depends upon "his own judgment as to * * * what is aggression" (p. 8, *supra;* Negre Brief p. 11); and Gillette's objection is to "this unnecessary and unjust war" (p. 4, *supra*).

[19] This, of course, recognizes the fact that belief in the use of self-defense, as well as defense of home, family and associates is not inconsistent with a conscientious objection to war in any form. See *supra*, p. 20; and see *Sicurella* v. *United States*, *supra*, 348 U.S. at 391.

judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. See generally, Comment, 34 U. Chi. L. Rev. 79, 102, (1966). Without regard to the source of such a selective objection—whether religious in a narrow or broad sense or otherwise—there are compelling reasons of general policy for not establishing such an exemption from military service. Most fundamentally, any such exemption—based as it would necessarily be upon changeable political judgments of the moment—would be inconsistent with the concept of uniform, and hence fair, principles of exemption. Assuming (as we do in these cases) the sincerity of the particular individual's feelings, there would remain real problems in defining just what kind of selective objection is sufficient to warrant exemption either from all service or from combatant service. Unlike the statement "I cannot in conscience participate in any war", the statement "I cannot in conscience participate in this war" has no fixed meaning and can reflect a changeable spectrum of subjective feelings. For example, the individual may object to what he conceives to be the underlying "purpose" of the United States' combat operations in Vietnam, but that "purpose" may or may not have changed over the years; would such an objection properly justify a refusal to participate in the process of withdrawal from Vietnam? Or the individual may object not to the "purpose" but rather to the use of particular weapons or techniques, or

to the political coloration of the United States' allies. The range of possible views is broad, and both the matters to which the individual may object and his attitude toward them are subject to change from day to day. The further question would arise as to the circumstances under which a selective objection would warrant a complete exemption from military service rather than simply assignment to noncombatant duties or, perhaps, to a noncombat zone;[20] again, the problem would be much more intricate than in the case of the categorical objector, as to whom the alternatives are simply (1) whether his objections are only to personal participation in any war, or (2) whether they categorically forbid any service in support of the military.

Unless the Selective Service System and the military are to be required to defer to any individual's unexplained assertion (on sincere "religious" grounds) that he chooses not to serve at all at the present time or that he chooses not to enter combat, we cannot see how exemptions for selective objectors could be administered uniformly and fairly without exploration, in each case, into the matters we have

[20] Does the First Amendment contain a right, as petitioner Negre claims, to be discharged from the service merely because he opposes combat service in Vietnam, even though he could apparently in good conscience continue to serve in the army? Can petitioner Gillette validly assert his objection to the fighting in Vietnam as a defense to a refusal to submit to induction generally, when his duty may never involve Vietnam service?

suggested.[21] Such inquiries would inevitably be vexatious if not impossible to conduct with any hope of reaching fair and consistent results in each case. And apart from these more fundamental concerns, the purely administrative problems and delays that would arise would necessarily hinder the achievement of the basic objective of the Selective Service System—to raise necessary military manpower for the national defense (cf. *Falbo* v. *United States,* 320 U.S. 549, 553; *Estep* v. *United States,* 327 U.S. 114, 137 (Frankfurter, J., concurring); *Oestereich* v. *Selective Service Board,* 393 U.S. 233, 241 (Harlan, J. concurring); *Clark* v. *Gabriel,* 393 U.S. 256, 258–259).

These considerations, all secular rather than religious, (see *Abington School District* v. *Schempp,* 374 U.S. 203, 222; *Board of Education* v. *Allen,* 392 U.S. 236, 243), provide ample basis for the legislative judgment to excuse only those persons whose beliefs cause them to oppose participation in all wars and not those persons who assert the right to choose the war in which they will fight. Petitioners have failed to show, as they cannot, an "absence of any substantial legislative purpose other than a religious one" for so

[21] These difficulties would, of course, be added to the difficulties we have already suggested of determining in each case whether one seeking an exemption on grounds of a "selective" objection to a particular war sincerely reached his political judgment that the war is unjust for reasons that are religiously motivated (however broadly "religion" is defined) rather than based *solely* on political, sociological and economic considerations. See generally Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. Pitt. L. Rev. 695 (1958).

delineating the exemption. *McGowan* v. *Maryland,* 366 U.S. 420, 468 (Frankfurter, J., concurring). There is, of course, as Mr. Justice Brennan pointed out in his separate opinion in *Schempp, supra,* 374 U.S. at 295, "nothing in the Establishment Clause [that] forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs." Congress has sought to do no more here; "[t]he constitutional [obligation of] neutrality * * * 'is not so narrow a channel' " that it will not accommodate a legislative judgment based upon the qualitative difference between general and selective conscientious objections that is clearly definable without discrimination among or even reference to matters of religious belief. *Walz* v. *Tax Commission,* 397 U.S. 664, 669.

B

Nor can it reasonably be maintained that, in deciding to require service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. As already pointed out, there is no constitutional right to exemption from military service; that right is accorded to those who conscientiously object to all wars solely as a matter of legislative grace. See *Welsh* v. *United States, supra,* 398 U.S. at 356 (Harlan, J., concurring). In his separate opinion in *Hamilton* v. *Regents,* 293 U.S. 245, 268, Mr. Justice Cardozo, joined by Justices Stone and Brandeis, recognized that extreme

deference to a conscientious objector's claim of religious liberty might well lead to wholly incongruous situations:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end, to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Most religions (and their humanistic equivalents) recognize that there are areas in which individual conscience governs the application of religious (or humanistic) doctrine to particular circumstances. Accordingly, there are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government, just as petitioners do here.[22] But

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[22] The Catholic religion, for one, teaches that conscience in representing God has more right to be obeyed than any law contrary to conscience (Pope John XXIII, *Pacem in Terris*, page 142a, April 11, 1963): "Since the right to command is required by moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the unauthorizations granted can be binding on the consciences of the citizens of US, since God has more rights to be obeyed than man" (N. App. 9–10). Nor is such

that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Moral conviction derived from political judgment may well justify civil disobedience in the mind of the lawbreaker, but it is not a valid defense to breaking the law. And this must be true whether or not the law thought to be unjust requires an affirmative act. Compare *United States* v. *McFadden, supra; United States* v. *Bowen, supra.* A person cannot lawfully refuse to pay taxes because he conscientiously believes it is wrong or irreligious to contribute to an unjust war. Nor can he escape affirmative registration requirements of the Selective Service System because they are not consonant with his religious conscientious objector belief. See *United States* v. *Henderson,* 180 F. 2d 711, 713–716 (C.A. 7).

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require the inclusion of those who, on the basis of some "religious" motivation, hold a "selec-

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belief in freedom of conscience confined to Catholicism. It applies with equal force both to theistic and nontheistic religions. See generally *amicus* briefs submitted by representatives of the following religions: Baptist, Jewish, Lutheran, Presbyterian, Quaker, American Ethical Union, Church of the Brethren, Disciples of Christ, United Church of Christ, Reformed Church in America, and also the interdenominational National Council of Churches. There are strong suggestions in the briefs that the role ascribed to individual conscience by the various religions are quite similar. There is also some suggestion that religions other than Catholicism also recognize a distinction among wars.

tive" conscientious objection to participation in a particular war.[23] And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach untold other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed. Such a construction of the First Amendment would be destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process.

Thus, if the legislative determination that the "selective" objector must serve in the military be deemed to impinge on the free exercise of his "religious" beliefs, it is a permissible intrusion under the standards enunciated by this Court in *Sherbert* v. *Verner,* 374 U.S. 398, 406–407.[24] The compelling interest that warrants any such intrusion is not merely one of administrative convenience or the need for some degree of certainty in providing necessary military manpower, though these, of course, are relevant and important considerations to our national security. See generally, Clark, *Guidelines For the Free Exer-*

[23] Language purporting to protect a general "right of conscience" was in fact included in early drafts of the Bill of Rights, but was eliminated from the provisions finally adopted and submitted to the States for ratification. See Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 416–417 (1952).

[24] We note further that there is not here any such discrimination among religions as the Court adverted to in *Sherbert* in noting that South Carolina law made specific provision for Sunday worshippers as distinguished for Sabbatarians (374 U.S. at 406). See pp. 33–34 *infra*.

cise Clause, 83 Harv. L. Rev. 327, 330–336, 349. Nor is it limited to the interest in uniform, and hence fair, administration of the draft laws. Congress also has a responsibility to preserve the governmental integrity by not allowing political dissent, no matter how sincerely and religiously motivated, to excuse a person from the duties lawfully imposed by the government on all persons in the same class. In achieving this end by limiting the draft exemption to those opposed to "war in any form," Congress has successfully "chart[ed] a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz* v. *Tax Commissioner, supra,* 397 U.S. at 672.[25]

C

What we have already said adequately answers the further contention that the legislative distinction between categorical and selective conscientious objectors amounts to arbitrary or invidious discrimination in violation of the equal protection concepts of the Fifth Amendment. Plainly, Congress was within the permissible range of legislative judgment in drawing the line on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend, as we

[25] This Court recognized in *Walz*, 397 U.S. at 673, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."

have shown, upon social or political considerations of the moment. Congress could, of course, determine to draw the line as petitioners suggest, but that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.[26]

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[26] The majority of the National Advisory Commission on Selective Service in its suggestions to the President voted to "retain the present requirement of the statute, that conscientious objection must be based on moral opposition to war in all forms." (Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* p. 50 (1967). The majority concluded (*ibid.*): "[T]he status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others." The Commission majority was of the opinion that "so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions" (*ibid*). The majority also expressed concern that "legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax." (*ibid.*) The majority concluded also "that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the

CONCLUSION

For the reasons stated, the judgment of conviction in No. 85, and the denial of the petition for habeas corpus in No. 325, should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
RICHARD L. ROSENFIELD,
Attorneys.

NOVEMBER 1970.

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individual the necessity of making that distinction—which would be the practical effect of taking away the Government's obligation of making it for him—could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition. No such problem arises for the conscientious objector, even in uniform, who bases his moral stand on killing in all forms, simply because he is never trained for nor assigned to combat duty" (*id.* at pp. 50–51).

U.S. GOVERNMENT PRINTING OFFICE: 1970

IN THE

Supreme Court of the United States

October Term, 1970
No. 85

GUY PORTER GILLETTE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

No. 325

LOUIS A. NEGRE,

Petitioner,

vs.

STANLEY R. LARSEN, Commanding General, *et al.*

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The undersigned, George T. Altman, as attorney and on his own behalf, hereby moves the Court for leave to file the brief *amicus curiae* submitted herewith, in support of reversal of the decisions below.

The reason for his submitting this brief is his concern as attorney with pending matters involving the same issue, and his attendance at meetings of attorneys likewise concerned.

The undersigned has the express written consent of the Solicitor General to the filing of this brief. He also requested the consent of the attorneys for both petitioners. Their responses, in writing, state only that the filing may be too late.

The brief is limited to argument and rests upon a single case, one also heavily relied on by respondents. The undersigned attorney firmly believes that it presents a very important point and strongly urges for that reason that this motion be granted.

November 25, 1970.

GEORGE T. ALTMAN

BRIEF AMICUS CURIAE.

This brief is in support of reversal of the decisions below.

The brief for respondents states, at page 19, quoting from *Sicurella v. United States*, 348 U.S. 385, 391, that in the statutory provision involved herein providing for exemption from service, of conscientious objectors to "participation in war in any form," Congress had in mind as the scope of "war in any form"—

> "actual military conflicts *between nations* of the earth *in our time*—wars with bombs and bullets, tanks, planes and rockets." (Emphasis added.)

Then the brief states:

> "As to this 'type' of war, it is implicit in the Court's language that a conscientious objection, on religious grounds, must under the terms of the statute be absolute."

But, the brief contends, the objection of petitioners does not qualify because it is not to that type of war, completely, but only the conflict in Vietnam (Br. 5, 10).

In the first place, however, it is readily observable that the Vietnam conflict is not that type of war at all. It is not "between nations;" it is strictly a war against an ideology, a sort of crusade, like those so in fact entitled, the "Crusades" of the 12th and 13th centuries. This is made clear in all government reports, and all press reports, and we ask this Court to take judicial notice of it. The "enemy" is not a "nation," nor even the citizens or members of a nation. It is the in-

dividuals in and around Vietnam, however organized, who believe in, or are sympathetic to, or support, a given economic ideology. Everywhere in reports they are identified solely as "communists." The reports of the "body count" especially make this clear. Our casualties are identified as "American" casualties; those of the local forces we support, as "South Vietnamese" casualties; but those of the "enemy" as casualties of the "communists."

That is obviously the reason why there was no declaration of war; there could not be any against an ideology. That is also why the character of the fighting is what it is. The "search and destroy" missions are directed against the believers in, or supporters of, that ideology, whether armed or unarmed, whether man, woman or child. If there is an area in which the people are all thought to be in that category, it is labeled a "free-fire zone," meaning that all human life there is to be destroyed. That is the way it must be; for viewed from the standpoint of the fight against that ideology, each believer in it, regardless of physical armament, sex, or age, is an armed enemy.

It is easy to demonstrate, in the second place, that for the United States no other type of war is possible "in our time." Nuclear war, whether between nations or otherwise, is impossible. A nation would have to go berserk to attempt it, strictly from the standpoint of its own survival. We used the atom bomb in 1945 because at that time we, and our then atomic associates,

England and Canada, were the only ones who knew how to make it, and we alone had the bomb itself.

It is clear also that in that type of war the word "participation" in the exemption provision here involved would have no meaning. Individual soldiers could serve no purpose in that type of conflict.

What is left of weapons—nonnuclear bombs, bullets, tanks, *et cetera*—has now become small arms. No nation which has nuclear capability would dare rely on those small arms against another nation which could respond with nuclear weapons. It results that for the United States a war "between nations," employing troops, no longer presents a realistic possibility "in our time." The type of war represented by Vietnam, a war with those small arms, and against individuals however organized, because of their economic beliefs, a crusade against their ideology, has become as a result the only type of war possible "in our time." Were it not for the anti-communist hysteria in the United States, a hysteria which has reached the level of what is known medically as "collective psychosis", even this type of war would not be possible. As evidenced by their recoil from the reports of massacres by our troops, the people of the United States are human beings.

Thus the "type" of war as to which respondents say conscientious objection must be "absolute" does not exist and is no longer possible, and the "type" of war which is possible and which in fact is going on, to that "type" the petitioners' objection is absolute.

Therefore *Sicurella* clearly supports them; for the thrust of that case is wholly to eliminate from "war in any form" the impossible and the visionary, to confine the term to the possible and the real. Nothing is more possible, nothing is more real, than the here and the now. Nothing is more clearly "in our time." Respondents in their brief make no attempt to describe, in terms related to the world we in fact live in, the world as it actually is, in just what "form," and how, a war involving American forces could or might arise, could or might be, different in any significant sense from the war that is. They do not and they cannot.

For the reasons stated the decisions below should be reversed.

Respectfully submitted,

GEORGE T. ALTMAN.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GILLETTE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85. Argued December 9, 1970—Decided March 8, 1971*

Petitioner in No. 85, who was convicted for failure to report for induction, and petitioner in No. 325, who sought discharge from the armed forces upon receipt of orders for Vietnam duty, claim exemption from military service because of their conscientious objections to participation in the Vietnam conflict, as an "unjust" war, pursuant to § 6 (j) of the Military Selective Service Act of 1967. That section provides that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners also challenge the constitutionality of § 6 (j) as construed to cover only objectors to all war, as violative of the Free Exercise and Establishment of Religion Clauses of the First Amendment. *Held:*

1. The exemption for those who oppose "participation in war in any form" applies to those who oppose participating in all war and not to those who object to participation in a particular war only, even if the latter objection is religious in character. Pp. 3–11.

2. Section 6 (j) does not violate the Establishment Clause of the First Amendment. Pp. 11–23.

(a) The section on its face does not discriminate on the basis of religious affiliation or belief, and petitioners have not shown the absence of neutral, secular bases for the exemption. Pp. 13–15.

(b) The exemption provision focuses on individual conscientious belief and not on sectarian affiliations. P. 16.

(c) There are valid neutral reasons, with the central emphasis on the maintenance of fairness in the administration of

*Together with No. 325, *Negre* v. *Larsen et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

Syllabus

military conscription, for the congressional limitation of the exemption to "war in any form," and therefore § 6 (j) cannot be said to reflect a religious preference. Pp. 17–23.

3. Section 6 (j) does not violate the Free Exercise Clause. It is not designed to interfere with any religious practice and does not penalize any theological position. Any incidental burdens felt by petitioners are justified by the substantial governmental interests relating to military conscription. Pp. 23–25.

No. 85, 420 F. 2d 298, and No. 325, 418 F. 2d 908, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., concurred in the judgment and in Part I of the Court's opinion. DOUGLAS, J., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 85 & 325.—October Term, 1970

85	Guy Porter Gillette, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
325	Louis A. Negre, Petitioner, *v.* Stanley R. Larsen et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 8, 1971]

Mr. Justice Marshall delivered the opinion of the Court.

These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service. Specifically, we are called upon to decide whether conscientious scruples relating to a particular conflict are within the purview of established provisions[1] relieving conscientious objectors to war from military service. Both petitioners also invoke constitutional principles barring government interference with the exercise of religion and requiring governmental neutrality in matters of religion.

In No. 85, petitioner Gillette was convicted of wilful failure to report for induction into the armed forces. Gillette defended on the ground that he should have been ruled exempt from induction as a conscientious objector to war. In support of his unsuccessful request for classi-

[1] The relevant provisions are set down *infra*, at nn. 4, 5, and 6, and at accompanying text.

fication as a conscientious objector, this petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as "unjust." Petitioner concluded that he could not in conscience enter and serve in the armed forces during the period of the Vietnam conflict. Gillette's view of his duty to abstain from any involvement in a war seen as unjust is, in his words, "based on a humanist approach to religion," and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.

The District Court determined that there was a basis in fact to support administrative denial of exemption in Gillette's case. The denial of exemption was upheld, and Gillette's defense to the criminal charge rejected, not because of doubt about the sincerity or the religious character of petitioner's objection to military service, but because his objection ran to a particular war. In affirming the conviction, the Court of Appeals concluded that Gillette's conscientious beliefs "were specifically directed against the war in Vietnam," while the relevant exemption provision of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j), "requires opposition 'to participation in war in any form.'" 420 F. 2d 298, 299–300 (CA2 1970).

In No. 325, petitioner Negre, after induction into the Army, completion of basic training, and receipt of orders for Vietnam duty, commenced proceedings looking to his discharge as a conscientious objector to war. Application for discharge was denied, and Negre sought judicial relief by habeas corpus. The District Court found a basis in fact for the Army's rejection of petitioner's application for discharge. Habeas relief was denied, and the

denial was affirmed on appeal, because, in the language of the Court of Appeals, Negre "objects to the war in Vietnam, not to all wars," and therefore does "not qualify, for separation [from the Army], as a conscientious objector."[2] 418 F. 2d 908, 909–910 (CA9 1969). Again, no question is raised as to the sincerity or the religious quality of this petitioner's views. In line with religious counseling and numerous religious texts, Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between "just" and "unjust" wars, and to foreswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and "all that I had been taught in my religious training."

We granted certiorari in these cases, 399 U. S. 925 (1970), in order to resolve vital issues concerning the exercise of congressional power to raise and support armies, as affected by the religious guaranties of the First Amendment. We affirm the judgments below in both cases.

I

Each petitioner claims a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples.[3] Both claims turn on the proper

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[2] Since petitioner Negre is no longer on active duty in the Army, the dispute in No. 325 lacks the same intensity that was present at the time that Negre commenced his habeas action. However, some possibility of Vietnam duty apparently remains, and the Government seems to concede that the case has not been mooted. We therefore pursue the matter no further.

[3] Both petitioners asked to be spared all military responsibilities because of their objections to the Vietnam conflict—Gillette sought exemption from the draft; Negre sought discharge from the Army.

construction of § 6 (j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j), which provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[4]

This language controls Gillette's claim to exemption, which was asserted administratively prior to the point of induction. Department of Defense Directive No. 1300.6 (May 10, 1968), prescribes that post-induction claims to conscientious objector status shall be honored, if valid, by the various branches of the armed forces.[5] Section 6 (j) of the Act, as construed by the courts, is

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[4] Section 6 (j) provides further:

"As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces . . . , be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered . . . to perform . . . civilian work contributing to the maintenance of the national health, safety, or interest . . . ."

[5] The Directive states:

"IV. A. *National Policy*. . . . [T]he Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form . . . shall not be inducted into the Armed Forces . . . .

"IV. B. *DoD Policy*. Consistent with this national policy, bona fide conscientious objection . . . by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized."

incorporated by the various service regulations issued pursuant to the Directive,[6] and thus the standards for measuring claims of in-service objectors, such as Negre, are the same as the statutory tests applicable in a pre-induction situation.

For purposes of determining the statutory status of conscientious objection to a particular war, the focal language of § 6 (j) is the phrase, "conscientiously opposed to participation in war in any form." This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war. See *Welsh* v. *United States*, 398 U. S. 333, 340, 342 (1970); *id.*, at 347, 357 (concurring opinion). See also *United States* v. *Kauten*, 133 F. 2d 703, 707 (CA2 1943). It matters little for present purposes whether the words, "in any form," are read to modify "war" or "participation." On the first reading, conscientious scruples must implicate "war in any form," and an objection involving a particular war rather than all war would plainly not be covered by § 6 (j). On the other reading, an objector must oppose "participation in war." It would strain good sense to read this phrase otherwise than to mean, "participation in all war." For the word "war" would still be used in an unqualified, generic sense, meaning war as such. Thus,

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[6] DOD Directive No. 1300.6 itself states:

"Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining [conscientious objector status] of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service."

See also, *e. g.*, Army Regulations AR 635-20 (July 31, 1970), and AR 135-25 (September 2, 1970).

however the statutory clause be parsed, it remains that conscientious objection must run to war in any form.[7]

A different result cannot be supported by reliance on the materials of legislative history.[8] Petitioners and

[7] Moreover, a reading that attaches the words "in any form" to "participation," rather than to "war," would render § 6 (j) somewhat incoherent. For that section itself allows a person having the specified conscientious scruples to be assigned to noncombatant service in the armed forces, if he is not "found to be conscientiously opposed to participation in such noncombatant service." See n. 4, *supra*. In short, Congress had in mind that conscientious scruples should be honored if they implicate opposition to "war in any form," even though the objector may not be averse to a noncombatant form of "participation."

[8] The roots of § 6 (j) may be found in the earliest period of American history. See generally Selective Service System Monograph No. 11, Conscientious Objection 29–38 (1950). In 1775 the Continental Congress announced its resolve to respect the beliefs of "people who from Religious Principles cannot bear Arms in any case . . . ." *Id.*, at 33–34. Against a background of state constitutional and statutory law exempting conscientious objectors from militia service, see *United States* v. *Seeger*, 380 U. S. 163, 170–171 (1965), Congress in 1864 explicitly exempted from the federal draft persons who "are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the articles of faith [of their] religious denominations." 13 Stat. 6, 9. The Draft Act of 1917 relieved from military service any person who belonged to "any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein . . . ." 40 Stat. 76, 78. The Senate rejected an amendment to the 1917 legislation which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war." 55 Cong. Rec. 1474, 1478. Subsequent exemption clauses have eliminated any restriction in terms of sectarian affiliation, and have made the exemption broadly available to any conscientious objector whose scruples concerning participation in war are grounded in "religious training and belief." Selective Training and Service Act of 1940, 54 Stat. 885, 889. But the phrase "participation in war in any form," used in the 1917 enactment, has of course survived the various revisions of the exempting provision.

amici point to no episode or pronouncement in the legislative history of § 6 (j), or of predecessor provisions, that tends to overthrow the obvious interpretation of the words themselves.[9]

It is true that the legislative materials reveal a deep concern for the situation of conscientious objectors to war, who absent special status would be put to a hard choice between contravening imperatives of religion and conscience or suffering penalties. Moreover, there are clear indications that congressional reluctance to impose such a choice stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state.

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[9] Petitioners' sole argument having specific reference to the legislative materials is utterly flawed. It runs as follows: the 1948 revision of the exempting provision was inspired in part by the dissent of Chief Justice Hughes in *United States* v. *MacIntosh*, 283 U. S. 589 (1931); *MacIntosh* involved a claimant whose conscientious scruples implicated only "unjust" wars, and the dissent remarked that "eminent statesmen here and abroad" have held such views, *id.*, at 635; thus Congress cannot fairly be deemed to have excluded objectors to particular wars from the 1948 exempting provision, predecessor to the present § 6 (j). However, the very most that can be said about congressional reliance on the *MacIntosh* dissent is that Congress used it in fashioning a definition of the words "religious training and belief." See *United States* v. *Seeger*, 380 U. S. 163, 172–179 (1965). The language of the exempting provision that is relevant to the present dispute—"participation in war in any form"—was not altered in 1948 or thereafter. Moreover, the *MacIntosh* dissent does not itself suggest that conscientious objection to a particular war is or has ever been a basis for relief from military service. The claimant in *MacIntosh* did not seek relief from military service—his contention, and that of the dissent, was that conscientious unwillingness to bear arms is not a disqualifying factor, under the language of the applicable loyalty oath, in a naturalization proceeding. (The argument of the dissent was later adopted by the Court in *Girouard* v. *United States*, 383 U. S. 61, 64 (1946).)

See *United States* v. *Seeger*, 380 U. S. 163, 170–172 (1965); *United States* v. *MacIntosh*, 283 U. S. 605, 631–634 (1931) (dissenting opinion). See generally Selective Service System Monograph No. 11, Conscientious Objection (1950). But there are countervailing considerations, which are also the concern of Congress,[10] and the legislative materials simply do not support the view that Congress intended to recognize any conscientious claim whatever as a basis for relieving the claimant from the general responsibility or the various incidents of military service. The claim that is recognized by § 6 (j) is a claim of conscience running against war as such. This claim, not one involving opposition to a particular war only, was plainly the focus of congressional concern.

Finding little comfort in the wording or the legislative history of § 6 (j), petitioners rely heavily on dicta in the decisional law dealing with objectors whose conscientious scruples ran against war as such, but who indicated certain reservations of an abstract nature. It is instructive that none of the cases relied upon embraces an interpretation of § 6 (j) at variance with the construction we adopt today.[11]

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[10] See pp. 17–23, *infra*. See generally Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 50–51 (1967).

[11] Perhaps more significant is the fact that even lower courts that have granted relief to claimants who object to particular wars, have done so on constitutional, not statutory grounds, and have found § 6 (j) defective because it does not admit of such relief. See, *e. g.*, *United States* v. *McFadden*, 309 F. Supp. 502 (ND Calif. 1970), appeal pending on jurisdictional statement (No. 422, O. T. 1970); *United States* v. *Sisson*, 297 F. Supp. 902 (Mass. 1969), appeal dismissed for want of jurisdiction, 399 U. S. 267 (1970). Since we conclude that § 6 (j), interpreted in the obvious way, suffers no constitutional infirmity, there is no temptation to expand its intended scope by constructional fiat in order to "save" it.

Sicurella v. *United States*, 348 U. S. 385 (1955), presented the only previous occasion for this Court to focus on the "participation in war in any form" language of § 6 (j). In *Sicurella* a Jehovah's Witness who opposed participation in secular wars was held to possess the requisite conscientious scruples concerning war, although he was not opposed to participation in a "theocratic war" commanded by Jehovah. The Court noted that the "theocratic war" reservation was highly abstract—no such war had occurred since biblical times, and none was contemplated. Congress, on the other hand, had in mind "real shooting wars," *id.*, at 391, and Sicurella's abstract reservations did not undercut his conscientious opposition to participating in such wars. Plainly *Sicurella* cannot be read to support the claims of those, like petitioners, who for a variety of reasons consider one particular "real shooting war" to be unjust, and therefore opose participation in that war.[12]

It should be emphasized that our cases explicating the "religious training and belief" clause of § 6 (j), or cognate clauses of predecessor provisions, are not relevant to the present issue. The question here is not whether these petitioners' beliefs concerning war are "religious" in nature. Thus petitioners' reliance on *United States* v. *Seeger*, 380 U. S. 163 (1965), and *Welsh* v. *United States*, 398 U. S. 333 (1970), is misplaced. Nor do we decide

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[12] After noting that Sicurella's faith involved willingness to engage in theocratic conflict, though "without carnal weapons," the Court stated: "The test is not whether the registrant is opposed to all war, but whether he is opposed . . . to *participation* in war." 348 U. S., at 390. The plain purport of this statement is that opposition to theocratic war is not exacted, since Congress quite reasonably considered participation in "real shooting wars" to be the only sort of participation at stake. See also *Taffs* v. *United States*, 208 F. 2d 329, 331 (CA8 1953), cert. denied, 347 U. S. 928 (1954).

that conscientious objection to a particular war necessarily falls within § 6 (j)'s expressly excluded class [13] of "essentially political, sociological, or philosophical views, or a merely personal moral code." Rather we hold that Congress intended to exempt persons who oppose participating in all war—"participation in war in any form"—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is "religious" in character.

A further word may be said to clarify our statutory holding. Apart from abstract theological reservations, two other sorts of reservations concerning use of force have been thought by lower courts not to defeat a conscientious objector claim. Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such. See, *e. g., United States* v. *Haughton*, 413 F. 2d 736, 740–742 (CA9 1969); *United States* v. *Carroll*, 398 F. 2d 651, 655 (CA3 1968). But surely willingness to use force defensively in the personal situations mentioned is quite different from willingness to fight in some wars but not in others. Cf. *Sicurella* v. *United States*, 348 U. S., at 389. Somewhat more apposite to the instant situation are cases dealing with persons who oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable. See, *e. g., United States* v. *Owen*, 415 F. 2d 383, 390 (CA8 1969). Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the

[13] See n. 4, *supra*.

claimant's present sincerity of belief. At any rate there is an obvious difference between present sincere objection to all war, and present opposition to participation in a particular conflict only.

II

Both petitioners argue that § 6 (j), construed to cover only objectors to all war, violates the religious clauses of the First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature. While the two religious clauses—pertaining to "free exercise" and "establishment" of religion—overlap and interact in many ways, see *Abington School District* v. *Schempp*, 374 U. S. 203, 222–223 (1963); Freund, Public Aid To Parochial Schools, 82 Harv. L. Rev. 1680, 1684 (1969), it is best to focus first on petitioners' other contention, that § 6 (j) is a law respecting the establishment of religion. For despite free exercise overtones, the gist of the constitutional complaint is that § 6 (j) impermissibly discriminates among types of religious belief and affiliation.[14]

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[14] Petitioners also assert that the Fifth Amendment's Due Process Clause is violated, because the distinction embodied in § 6 (j)—between objectors to all war and objectors to particular wars—is arbitrary and capricious and works an invidious discrimination in contravention of the "equal protection" principles encompassed by the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). This is not an independent argument in the context of these cases. Cf. *Walz* v. *Tax Commission*, 397 U. S. 664, 696 (1970) (opinion of HARLAN, J.). We hold that the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that the line is neither arbitrary nor invidious.

On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature, within the meaning of the Amendment as well as this Court's decisions construing § 6 (j), petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6 (j), properly construed, has this effect. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion.

An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion. See *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968); *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947). Here there is no claim that exempting conscientious objectors to war amounts to an overreaching of secular purposes and an undue involvement of government in affairs of religion. Cf. *Walz* v. *Tax Commission*, 397 U. S. 664, 675 (1970); *id.*, at 695 (opinion of HARLAN, J.). To the contrary, petitioners ask for greater "entanglement" by judicial expansion of the exemption to cover objectors to particular wars. Necessarily the constitutional value at issue is "neutrality." And as a general matter it is surely true that the Establishment Clause prohibits government from departing secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. See *Engel* v. *Vitale*, 370 U. S. 421, 430–431 (1962); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961). The metaphor of a "wall" or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis, see *Walz* v. *Tax Commission*, 397 U. S. 664, 668–669 (1970); *Zorach* v. *Clauson*, 343 U. S. 306, 312–313 (1952), but the Establishment Clause

stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. *Abington School District* v. *Schempp*, 374 U. S. 203, 222 (1963); *id.*, at 231 (BRENNAN, J., concurring); *id.*, at 305 (Goldberg, J., concurring).

A

The critical weakness of petitioners' establishment claim arises from the fact that § 6 (j), on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war. The section says that anyone who is conscientiously opposed to all war shall be relieved of military service. The specified objection must have a grounding in "religious training and belief," but no particular sectarian affiliation or theological position is required. The Draft Act of 1917, 40 Stat. 76, 78, extended relief only to those conscientious objectors affiliated with some "well-recognized religious sect or organization" whose principles forbade members' participation in war, but the attempt to focus on particular sects apparently broke down in administrative practice, *Welsh* v. *United States*, 398 U. S. 333, 367 n. 19 (1970) (concurring opinion), and the 1940 Selective Training and Service Act, 54 Stat. 885, 889, discarded all sectarian restriction.[15] Thereafter Congress has framed the conscientious objector exemption in broad terms compatible with "its long-established policy of not picking and choosing among religious beliefs." *United States* v. *Seeger*, 380 U. S. 163, 175 (1965).

Thus there is no occasion to consider the claim that when Congress grants a benefit expressly to adherents of one *religion*, courts must either nullify the grant or

[15] See n. 8, *supra*.

somehow extend the benefit to cover all religions. For § 6 (j) does not single out any religious organization or religious creed for special treatment. Rather petitioners' contention is that since Congress has recognized one sort of conscientious objection concerning war, whatever its religious basis, the Establishment Clause commands that another, different objection be carved out and protected by the courts.[16]

Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course this contention of de facto religious discrimination, rendering § 6 (j) fatally underinclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6 (j) on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, "religious gerrymanders," as well as obvious abuses. *Walz* v. *Tax Commission*, 397 U. S. 664, 696 (1970) (opinion of HARLAN, J.). See also *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (opinion of Warren, C. J.); *Illinois ex*

[16] Since we hold that the "participation in war in any form" clause of § 6 (j) does not violate the First Amendment, there is little point in dealing with the problems that would be involved in deciding whether invalidity of the restrictive clause should lead to judicial nullification of the exemption *in toto* or judicial expansion to cure "underinclusiveness."

rel McCollum v. *Board of Education*, 333 U. S. 203, 213, 232 (1948) (opinion of Frankfurter, J.). Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn. See *Epperson* v. *Arkansas*, 393 U. S. 97, 107–109 (1968); *Board of Education* v. *Allen*, 392 U. S. 236, 248 (1968); *McGowan* v. *Maryland*, 366 U. S. 420, 442–444 (1961); *id.*, at 468 (separate opinion of Frankfurter, J.). For the reasons that follow, we believe that petitioners have failed to make the requisite showing with respect to § 6 (j).

Section 6 (j) serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions.[17] There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, *Welch* v. *United States*, 398 U. S. 333, 369 (1970) (WHITE, J., dissenting), but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." *United States* v. *MacIntosh*, 283 U. S. 605, 633 (1931) (Hughes, C. J., dissenting). See *United States* v. *Seeger*, 380 U. S. 163, 170–172 (1965). We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.[18]

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[17] The exemption provision of the Draft Act of 1917, 40 Stat. 76, 78, was upheld in *The Selective Draft Law Cases*, 245 U. S. 366, 389–390 (1918), at an early stage in the development of First Amendment doctrine, against a constitutional attack apparently founded on both the Establishment and Free Exercise Clauses. A single sentence was devoted to the complainants' First Amendment argument, "because we think its unsoundness is too apparent to require us to do more." *Id.*, at 390.

[18] See pp. 7–8, *supra*.

Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption,[19] it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States* v. *MacIntosh*, 283 U. S. 605, 634 (1931) (Hughes, C. J., dissenting). See *Abington School District* v. *Schempp*, 374 U. S. 203, 294–299 (1963) (BRENNAN, J., concurring); *id.*, at 306 (Goldberg, J., concurring); *id.*, at 309 (STEWART, J., dissenting). See also *Welsh* v. *United States*, 398 U. S. 333, 370–373 (1970) (WHITE, J., dissenting). "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, *Walz* v. *Tax Commission*, 397 U. S. 664, 669 (1970), so long as an exemption is tailored broadly enough that it reflects valid secular purposes. In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint. And while the objection must have roots in conscience and personality that are "religious" in nature, this requirement has never been construed to elevate conventional piety or religiosity of any kind above the imperatives of a personal faith.

In this state of affairs it is impossible to say that § 6 (j) intrudes upon "voluntarism" in religious life, see *id.*, at

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[19] See n. 23, *infra*.

694–696 (opinion of HARLAN, J.), or that the congressional purpose in enacting § 6 (j) is to promote or foster those religious organizations that traditionally have taught the duty to abstain from participation in any war. A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6 (j) encourages membership in putatively "favored" religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations.

B

We conclude not only that the affirmative purposes underlying § 6 (j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference.

Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining "who serves when not all serve." [20] When the Government exacts so much, the importance of fair, evenhanded, and uniform decisionmaking is obviously intensified. The Government argues that the interest in fairness would be jeopardized by expansion of § 6 (j) to include conscientious objection to a particular war. The contention is that the claim to relief on account of such objection is intrinsically a claim of uncertain dimensions, and that granting the claim in theory would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice.

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[20] The Report of the National Advisory Commission on Selective Service (1967) is aptly entitled, In Pursuit of Equity: Who Serves When Not All Serve?

A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." [21] All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise. See *United States* v. *Kauten*, 133 F. 2d 703, 708 (CA2 1943). The difficulties of sorting the two, with a sure hand, are considerable. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole. In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results . . . ." Brief, at 28.

For their part, petitioners make no attempt to provide a careful definition of the claim to exemption which they

[21] Matters relevant to such an objection, as the papers in these cases show, are whether the purposes of the war are thought ultimately defensive and pacific, or otherwise; whether the conflict is legal, or its prosecution decided upon by legal means; whether the implements of war are used humanely, or whether certain weapons should be used at all. A war may be thought "just" or not depending on one's assessment of these factors and many more: the character of the foe, or of allies; the place the war is fought; the likelihood that a military clash will issue in benefits, of various kinds, enough to override the inevitable costs of the conflict. And so on.

ask the courts to carve out and protect. They do not explain why objection to a particular conflict—much less an objection that focuses on a particular facet of a conflict—should excuse the objector from all military service whatever, even from military operations that are connected with the conflict at hand in remote or tenuous ways.[22] They suggest no solution to the problems arising from the fact that altered circumstances may quickly render the objection to military service moot.

To view the problem of fairness and evenhanded decisionmaking, in the present context, as merely a commonplace chore of weeding out "spurious claims," is to minimize substantial difficulties of real concern to a responsible legislative body. For example, under the petitioners' unarticulated scheme for exemption, an objector's claim to exemption might be based on some feature of a current conflict which most would regard as incidental, or might be predicated on a view of the facts which most would regard as mistaken. The particular complaint about the war may itself be "sincere," but it is difficult to know how to judge the "sincerity" of the objector's conclusion that the war *in toto* is unjust and that any personal involvement would contravene conscience and religion. To be sure, as we have ruled, in connection with § 6 (j), that "the 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held." *United States* v. *Seeger*, 380 U. S. 163, 185 (1965). See also *United States* v. *Ballard*, 322 U. S. 78 (1944). But we must also recognize that "sincerity" is a concept that can bear only so much adjudicative weight.

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Con-

[22] See n. 3, *supra*.

gress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled. There is even a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. At any rate, it is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. *Walz* v. *Tax Commission*, 397 U. S. 664, 698–699 (1970) (opinion of HARLAN, J.). Cf. *Presbyterian Church* v. *Mary Elizabeth Blue Hull Church*, 393 U. S. 440 (1969). While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory.

In addition to the interest in fairness, the Government contends that neutral, secular reasons for the line drawn by § 6 (j)—between objection to all war and objection to a particular war—may be found in the nature of the conscientious claim which these petitioners assert. Opposition to a particular war, states the Government's Brief, necessarily involves a judgment "that is political and particular," one "based on the same political, sociological and economic factors that the government necessarily considered" in deciding to engage in a particular conflict. Brief, at 24–26. Taken in a narrow sense,

these considerations do not justify the distinction at issue, for however "political and particular" the judgment underlying objection to a particular war, the objection still might be rooted in religion and conscience, and although the factors underlying that objection were considered and rejected in the process of democratic decisionmaking, likewise the viewpoint of an objector to all war was no doubt considered and "necessarily" rejected as well. Nonetheless it can be seen on a closer view that this line of analysis, conjoined with concern for fairness, does support the statutory distinction.

Tacit at least in the Government's view of the instant cases is the contention that the limits of § 6 (j) serve an overriding interest in protecting the integrity of democratic decisionmaking against claims to individual noncompliance. Despite emphasis on claims that have a "political and particular" component, the logic of the contention is sweeping. Thus the "interest" invoked is highly problematical, for it would seem to justify governmental refusal to accord any breathing space whatever to noncompliant conduct inspired by imperatives of religion and conscience.

On the other hand, some have perceived a danger that exempting persons who dissent from a particular war, albeit on grounds of conscience and religion in part, would "open the doors to a general theory of selective disobedience to law" and jeopardize the binding quality of democratic decisions. Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve?, at 50 (1967). See also *Hamilton* v. *Regents*, 293 U. S. 245, 268 (1934) (Cardozo, J., concurring). Other fields of legal obligation aside, it is undoubted that the nature of conscription, much less war itself, requires the personal desires and perhaps the dissenting views of those who must serve to be subordinated in some degree to the pursuit

of public purposes. It is also true that opposition to a particular war does depend *inter alia* upon particularistic factual beliefs and policy assessments, beliefs and assessments which presumably were overridden by the government that decides to commit lives and resources to a trial of arms. Further, it is not unreasonable to suppose that some persons who are *not* prepared to assert a conscientious objection, and instead accept the hardships and risks of military service, may well agree at all points with the objector, yet conclude, as a matter of conscience, that they are personally bound by the decision of the democratic process. The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict.

We need not and do not adopt the view that a categorical, global "interest" in stifling individualistic claims to noncompliance, in respect of duties generally exacted, is the neutral and secular basis of § 6 (j). As is shown by the long history of the very provision under discussion, it is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special charactertistics, from general duties of a burdensome nature. But real dangers—dangers of the kind feared by the Commission—might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government. In short, the considerations men-

tioned in the previous paragraph, when seen in conjunction with the central problem of fairness, are without question properly cognizable by Congress. In light of these valid concerns, we conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.

Of course we do not suggest that Congress would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars. Our analysis of the policies of § 6 (j) is undertaken in order to determine the existence *vel non* of a neutral, secular justification for the lines Congress has drawn. We find that justifying reasons exist and therefore hold that the Establishment Clause is not violated.

III

Petitioners' remaining contention is that Congress interferes with the free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion. Strictly viewed, this complaint does not implicate problems of comparative treatment of different sorts of objectors, but rather may be examined in some isolation from the circumstance that Congress has chosen to exempt those who conscientiously object to all war.[23] And our holding that § 6 (j) comports with the

[23] We are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars. A free exercise claim on behalf of such objectors collides with the distinct governmental interests already discussed, and at any rate, no other claim is presented. We note that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution. See *Hamilton* v. *Regents*, 293 U. S. 245, 264 (1934); *United States* v. *MacIntosh*, 283 U. S. 605, 623–624 (1931); cf. *In re Summers*, 325 U. S. 561, 572–573 (1945).

Establishment Clause does not automatically settle the present issue. For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own. *Abington School District* v. *Schempp*, 374 U. S. 203, 222–223 (1963).

Nonetheless, our analysis of § 6 (j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304 (1940); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905); cf. *Cleveland* v. *United States*, 329 U. S. 14, 20 (1946). To be sure, the Free Exercise Clause bars "government regulation of religious *beliefs* as such," *Sherbert* v. *Verner*, 374 U. S. 398, 402 (1963), or interference with the dissemination of religious ideas. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). It prohibits misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions, . . . even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (opinion of Warren, C. J.). And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims. See *id.*; *Sherbert* v. *Verner*, 374 U. S. 398 (1963). See generally Clark, Guide-

lines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969). However, our analysis of § 6 (j) shows that the impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8.

IV

Since petitioners' statutory and constitutional claims to relief from military service are without merit, it follows that in Gillette's case (No. 85) there was a basis in fact to support administrative denial of exemption, and that in Negre's case (No. 325) there was a basis in fact to support the Army's denial of a discharge. Accordingly, the judgments below are

Affirmed.

MR. JUSTICE BLACK concurs in the Court's judgment and in Part I of the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1970

Guy Porter Gillette, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 8, 1971]

Mr. Justice Douglas, dissenting.

Gillette's objection is to combat service in the Vietnam war, not to wars in general, and the basis of his objection is his conscience. His objection does not put him into the statutory exemption which extends to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [1]

He stated his views as follows:

> "I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically "Humanism." This essentially means respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to improve some of the pains of the human condition."

This position is substantially the same as that of Sisson in *United States* v. *Sisson*, 297 F. Supp. 902, appeal dismissed, 399 U. S. 267, where the District Court summarized the draftee's position as follows:

> ". . . Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable,

[1] Section 6 (j), Military Selective Service Act of 1967, 50 U. S. C. § 456 (j) (1964 ed., Supp. IV).

> and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training, and beliefs shared by companions and family. What another derives from the discipline of a church, Sisson derives from the discipline of conscience." 297 F. Supp., at 905.

There is no doubt that the views of Gillette are sincere, genuine, and profound. The District Court in the present case faced squarely the issue presented in *Sisson* and being unable to distinguish the case on the facts, refused to follow *Sisson*.

The question, can a conscientious objector, whether his objection be rooted in "religion" or in moral values, be required to kill? has never been answered by the Court.[2] *Hamilton* v. *Regents*, 293 U. S. 245, did no more than hold that the Fourteenth Amendment did not require a State to make its university available to one who would not take military training. *United States* v. *Macintosh*, 283 U. S. 605, denied naturalization to a person who "would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified." *Id.*, at 613. The question of compelling a man to kill against his conscience was not squarely involved. Most of the talk in the majority opinion concerned "serving in the armed forces of the Nation in time of war." *Id.*, at 623. Such service can of course take place in noncombatant roles. The ruling was that such service is "dependent upon the will of

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[2] See Powell, Conscience and the Constitution, in Democracy and National Unity (W. Hutchison ed. 1941).

It is probably a universal truth that "the one thing which authority, whether political, social, religious or economic, tends instinctively to fear is the insistence of conscience." Mehta, The Conscience of a Nation or Studies in Gandhism. (Calcutta, 1933), p. ii.

Congress and not upon the scruples of the individual, except as Congress provides." *Ibid.* The *dicta* of the Court in the *Macintosh* case squint towards the denial of Gillette's claim, though as I have said, the issue was not squarely presented.

Yet if *dicta* are to be our guide, my choice is the *dicta* of Chief Justice Hughes who, dissenting in *Macintosh*, spoke for Holmes, Brandeis, and Stone:

> "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." *Id.*, at 635.

I think the Hughes' view is the constitutional view. It is true that the First Amendment speaks of the free exercise of religion not of the free exercise of conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied

First Amendment right of "conscience" is certainly as high as the "right of association" which we recognized in *Shelton* v. *Tucker,* 364 U. S. 479, and *NAACP* v. *Alabama,* 357 U. S. 449. Some indeed have thought it higher.[3]

Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense.

Tolstoy[4] wrote of a man "who, as he himself says, is not a Christian, and who refuses military service, not from religious motives, but from motives of the simplest kind, motives intelligible and common to all men, of whatever religion or nation, whether Catholic, Mohammedan, Buddhist, Confucian, whether Spaniards or Japanese.

> "Van de Veer refuses military service, not because he follows the commandment. 'Thou shalt do no murder,' not because he is a Christian, but because he holds murder to be opposed to human nature."

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[3] See Konvitz, Religious Liberty and Conscience 106 (1968); Redlich and Feinberg, Individual Conscience and the Selective Service Objector, 44 N. Y. U. L. Rev. 875, 891 (1969):

"Free expression and the right of personal conscientious belief are closely intertwined. At the core of the first amendment's protection of individual expression, is the recognition that such expression represents the oral or written manifestation of conscience. The performance of certain acts, under certain circumstances, involves such a crisis of conscience as to invoke the protection which the first amendment provides for similar manifestations of conscience when expressed in verbal or written expressions of thought. The most awesome act which any society can demand of a citizen's conscience is the taking of a human life."

[4] Tolstoy's Writings On Civil Disobedience and Nonviolence 12 (1967).

Tolstoy [5] goes on to say:

> "Van de Veer says he is not a Christian. But the motives of his refusal and action are Christian. He refuses because he does not wish to kill a brother man; he does not obey, because the commands of his conscience are more binding upon him than the command of men . . . . Thereby he shows that Christianity is not a sect or creed which some may profess and others reject; but it is naught else than a life's following of that light of reason which illumines all men . . . .
>
> "Those men who now behave rightly and reasonably do so, not because they follow prescriptions of Christ, but because that line of action which was pointed out eighteen hundred years ago has now become identified with human conscience."

The "sphere of intellect and spirit," as we described the domain of the First Amendment in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642, was recognized in *United States* v. *Seeger*, 380 U. S. 163, where we gave a broad construction to the statutory exemption of those who by their religious training or belief are conscientiously opposed to participation in war in any form. We said: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by

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[5] *Id.*, at 15–16. And see Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 337 (1969):

"The argument is not merely that avoiding compulsion of a man's conscience produces the greatest good for the greatest number, but that such compulsion is itself unfair to the individual concerned. The moral condemnation implicit in the threat of criminal sanctions is likely to be very painful to one motivated by belief. Furthermore, the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect."

the God of those admittedly qualifying for the exemption comes within the statutory definition." *Id.*, at 176.[6]

Seeger does not answer the present question as Gillette is not "opposed to participation in war in any form."

But the constitutional infirmity in the present Act seems obvious once "conscience" is the guide. As Chief Justice Hughes said in the *Macintosh* case:

> "But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." 283 U. S., at 633–634.

The law as written is a species of those which show an invidious discrimination in favor of religious persons and against others with like scruples. MR. JUSTICE BLACK once said: "The First Amendment has lost much if the religious follower and the athiest[7] are no longer to be judicially regarded as entitled to equal justice under law." *Zorach* v. *Clauson*, 343 U. S. 306, 320 (dissenting). We

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[6] In *Welch* v. *United States*, 398 U. S. 333, four Justices elaborated on *Seeger*, stating:

"The Court [in *Seeger*] made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. . . . What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions." *Id.*, at 339–340.

[7] Article VI of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Torcoro* v. *Watkins*, 367 U. S. 488, upheld the right of a nonbeliever to hold public office.

said as much in our recent decision in *Epperson* v. *Arkansas*, 393 U. S. 97, where we struck down as unconstitutional a state law prohibiting the teaching of the doctrine of evolution in the public schools:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.*, 103–104.

While there is no Equal Protection Clause in the Fifth Amendment, our decisions are clear that invidious classifications violate due process. *Bolling* v. *Sharpe*, 347 U. S. 497, 500, held that segregation by race in the public schools was an invidious discrimination, and *Schneider* v. *Rusk*, 377 U. S. 163, 168–169, reached the same result based on penalties imposed on naturalized, not native-born, citizens. A classification of "conscience" based on a "religion" and a "conscience" based on more generalized, philosophical grounds is equally invidious by reason of our First Amendment standards.

I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment.

This is an appropriate occasion to give content to our dictum in *Board of Education* v. *Barnette*, *supra*, at 642:

> ". . . freedom to differ is not limited to things that do not matter much . . . . The test of its substance is the right to differ as to things that touch the heart of the existing order."

I would reverse this judgment.

SUPREME COURT OF THE UNITED STATES

No. 325.—October Term, 1970

Louis A. Negre, Petitioner,
v.
Stanley R. Larsen et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 8, 1971]

Mr. Justice Douglas, dissenting.

I approach the facts of this case with some diffidence, as they involve doctrines of the Catholic Church in which I was not raised. But we have on one of petitioner's briefs an authoritative lay Catholic scholar, Dr. John T. Noonan, Jr., and from that brief I deduce the following.

Under the doctrines of the Catholic Church a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars.[1] Conversely, a Catholic has a moral duty not to participate in unjust wars.[2]

[1] The theological basis for this was explained by Pope John XXIII in Part II of Pacem in Terris, ¶ 46: "Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions. . . . These however derive their authority from God, as St. Paul teaches in the words, *There exists no authority except from God.* These words of St. Paul are explained thus by St. John Chrysostom: . . . *What I say is, that it is the divine wisdom and not mere chance, that has ordained that there should be government, that some should command and others obey.*" ¶ 50 adds: "When in fact, men obey their rulers it is not at all as men that they obey them, but through their obedience it is God . . . since He has decreed that men's dealings with one another should be regulated by an order which He himself has established."

[2] "Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities pass laws or command anything opposed to the moral order and consequently con-

The Fifth Commandment, "Thou shall not kill," provides a basis for the distinction between just and unjust wars. In the 16th century Francisco Victoria, Dominican master of the University of Salamanca and pioneer in international law, elaborated on the distinction. "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person." He realized not all men had the information of the prince and his counsellors on the causes of a war, but where "the proofs and tokens of the injustice of the war may be such that ignorance would be no excuse even to the subjects" who are not normally informed, that ignorance will not be an excuse if they participate.[3] Well over 400 years later, today, the Baltimore Catechism makes an exception to the Fifth Commandment for a "soldier fighting in a just war." [4]

No one can tell a Catholic that this or that war is either just or unjust. This is a personal decision that an individual must make on the basis of his own conscience after studying the facts.[5]

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trary to the will of God, neither the laws made nor the authorization granted can be binding on the consciences of the citizens, *since God has more right to be obeyed than men.*" *Id.*, at ¶ 51.

[3] De Indis Relectio Posterior, sive De iure Belli Hispanorum in Barbados, translated in Classics of International Law 173–174 (Nys ed. 1917).

[4] P. 205 (Official Rev. ed. 1949).

[5] Pope Paul VI in § 16 of the Pastoral Constitution states: "Deep within his conscience, man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and avoid evil, tells him inwardly at the right moment to do this or to shun that. For man has in his heart a law written by God. His dignity lies in observing this law, and by it he will be judged."

A. Fagothey, Right and Reason: Ethics in Theory and Practice 38 (1967) states: "Hence a certain conscience must be obeyed, not only when it is correct, but even when it is invincibly erroneous [unreal-

Like the distinction between just and unjust wars, the duty to obey conscience is not a new doctrine in the Catholic Church. When told to stop preaching to the Sanhedrin, to which he was subordinate by law, "Peter replied for himself and the apostles, 'We must obey God rather than men.' "[6] That duty has not changed. Pope Paul VI has expressed it as follows: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of the conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created."[7]

While the fact that the ultimate determination of whether a war is unjust rests on individual conscience, the Church has provided guides. Francisco Victoria referred to "killing of an innocent person." World War II had its impact on the doctrine. Writing shortly after

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ized error]. Conscience is the only guide a man has for the performance of concrete actions here and now. But an invincibly erroneous conscience cannot be distinguished from a correct conscience. Therefore if one were not obliged to follow a certain but invincibly erroneous conscience, we should be forced to the absurd conclusions that one would not be obliged to follow a certain and correct conscience." On this matter § 16 of the Pastoral Constitution adds: "Yet it often happens that conscience goes astray through ignorance which it is unable to avoid, but under such circumstances it does not lose its dignity. This cannot be said of the man who takes little trouble to find out what is true and good."

[6] Acts 5:29.

[7] Declaration on Religious Freedom I:3 in Documents of Vatican II 681 (1966). See also "Human Life in Our Day" issued by the National Conference of Catholic Bishops (Nov. 15, 1968): "Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-important issues of war and peace, all men will continue to follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force of universal natural law and its all embracing principles, to which man's conscience itself gives ever more emphatic voice.' "

the war Cardinal Ottaviani stated "modern wars can never fulfill those conditions which (as we stated earlier on in this essay) govern—theoretically—a just and lawful war. Moreover, no conceivable cause could ever be sufficient justification for the evils, the slaughter, the destruction, the moral and religious upheavals which war today entails. *In practice, then, a declaration of war will never be justifiable.*" [8] The full impact of the horrors of modern war were emphasized in the Pastoral Constitution announced by Vatican II:

> "The development of armaments by modern science has immeasurably magnified the horrors and wickedness of war. Warfare conducted with these weapons can inflict immense and indiscriminate havoc which goes far beyond the bounds of legitimate defense. Indeed, if the kind of weapons now stocked in the arsenals of the great powers were to be employed to the fullest, the result would be the almost complete reciprocal slaughter of one side by the other, not to speak of the widespread devastation that would follow in the world and the deadly aftereffects resulting from the use of such arms.
>
> "All of these factors force us to undertake a completely fresh reappraisal of war. . . .
>
> . . . . .
>
> "It is one thing to wage a war of self-defense; it is quite another to seek to impose domination on another nation. . . ."

The Pastoral Constitution announced that "every act of war directed to the indiscriminate destruction of whole cities or vast areas with their inhabitants is a crime against God and man which merits firm and unequivocal condemnation." [9]

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[8] The Future of Offensive War, 30 Blackfriars 415, 420 (1949).

[9] Pastoral Constitution ¶¶ 79, 80.

Louis Negre is a devout Catholic. In 1951 when he was four, his family immigrated to this country from France.[10] He attended Catholic schools in Bakersfield, California, until graduation from high school. Then he attended Bakersfield Junior College for two years. Following that he was inducted into the Army.

At the time of his induction he had his own convictions about the Vietnam war and the Army's goals in the war. He wanted, however, to be sure of his convictions. "I agreed to myself that before making any decision or taking any type of stand on the issue, I would permit myself to see and understand the Army's explanation of its reasons for violence in Vietnam. For, without getting an insight on the subject, it would be unfair for me to say anything, without really knowing the answer." [11]

On completion of his advanced infantry training, "I knew that if I would permit myself to go to Vietnam I would be violating my own concepts of natural law and would be going against all that I had been taught in my religious training." Negre applied for a discharge as a conscientious objector. His application was denied. He then refused to comply with an order to proceed for shipment to Vietnam. A general court martial followed,

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[10] Petitioner suggests that one of the reasons his parents left France was their opposition to France's participation in the Indo-China war.

[11] See n. 5 *supra*. Fagothey, *supra* n. 5, at 37 states: "What degree of certitude is required? It is sufficient that the conscience be prudentially certain. Prudential certitude is not absolute but relative. It excludes all *prudent* fear that the opposite may be true, but it does not rule out imprudent fears based on bare possibilities. the reasons are strong enough to satisfy a normally prudent man in an important matter, so that he feels safe in practice though there is a theoretical chance of his being wrong. He has taken every reasonable precaution, but cannot guarantee against rare contingencies and freaks of nature."

but he was acquitted. After that he filed this application for discharge as a conscientious objector.

Negre is opposed under his religious training and beliefs to participation in any form in the war in Vietnam. His sincerity is not questioned. His application for a discharge, however, was denied because his religious training and beliefs lead him to oppose only a particular war [12] which according to his conscience was unjust.

For the reasons I have stated in my dissent in the *Gillette* case decided this day, I would reverse the judgment.

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[12] "For those middle-aged people who find themselves baffled by the current widespread resistance to the draft, a Stanford University student has provided a useful parallel.

"Addressing a hearing of the Senate Armed Service Committee . . . , Peter Knutson said that 'If, during the course of the Second World War, America had entered on the side of Hitler's Germany, would you have allowed yourself to be drafted? Would you have blindly said my country right or wrong?'

"That is about as well as the anti-draft cause has ever been stated. . . .

"It may seem far-fetched to suppose that America ever would have fought on the side of Hitler, but that too is beside the point. If today's World War II veteran will try to imagine what he might have done had he been drafted under those circumstances, he will be able to understand some part of the dilemma that the Vietnam war has imposed on this generation of draftees. It has been a real dilemma breeding powerful frustrations, and its residues will long outlast the war."—L. H.—Lewiston (Ida.) Tribune.